

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 405

UNITED STATES, PETITIONER,

vs.

PIONEER AMERICAN INSURANCE COMPANY,  
ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE  
STATE OF ARKANSAS

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## Fort Smith District

No. 570

PIONEER AMERICAN INSURANCE COMPANY and GEORGE F.  
CARPENTER, TRUSTEE FOR PIONEER AMERICAN INSURANCE  
COMPANY, *Plaintiffs*

vs.

THE DEVELOPMENT COMPANY, INC., a corporation; CECIL  
LAUGHLIN, JAMES F. TAYLOR; OCIE A. ROGERS and  
FLORENE W. ROGERS; LEE DAVIS and JEFF DAVIS, part-  
ners d b a J. S. DAVIS & SONS LUMBER COMPANY; FIRST  
BANCREDIT CORPORATION, St. Paul, Minnesota; ALFRED  
J. ANDERSON, d b a ANDERSON PLUMBING & HEATING  
COMPANY; and UNITED STATES OF AMERICA, *Defendants*

**Complaint—Filed March 24, 1961.**

Come now the plaintiffs, by their attorneys, Bethell &  
Pearce and Lawson Cloninger, and for their cause of action  
against the defendants allege and state as follows:

1. On May 24, 1956, the defendants, The Development  
Company, Inc., a corporation, Cecil Laughlin and James F.  
Taylor, became indebted to Republic Mortgage Company,  
Inc. a corporation, in the amount of \$20,000.00, evidenced  
by their promissory note for that amount, with interest at  
the rate of six per cent per annum, payable in equal  
monthly installments of principal and interest in the  
amount of \$168.78, beginning July 1, 1956, and a like sum  
upon the first day of each month thereafter until said  
interest and principal shall have been paid in full, all  
past due principal and/or interest to bear interest  
at the rate of ten percent per annum. A copy of  
said note is attached hereto, made a part hereof, and  
marked Exhibit "A".

2. To secure the payment of said note, the defendant, The  
Development Company, Inc. executed and delivered to  
George F. Carpenter, Trustee for Republic Mortgage  
Company, Inc., its deed of trust dated May 24, 1956,

wherein it conveyed to George F. Carpenter, as Trustee for Republic Mortgage Company, Inc., the following real property situated in the City of Fort Smith, Sebastian County, Arkansas, to-wit:

Lots Five (5) and Six (6) in Block Eighty-three (83) of Fitzgerald Addition to the City of Fort Smith, Sebastian County, Arkansas.

3. Said deed of trust was duly acknowledged, and was on June 7, 1956, filed for record in the office of the recorder for the Fort Smith District of Sebastian County, Arkansas, and now appears of record in Book 186 at page 490.

4. In said deed of trust, the defendant, The Development Company, Inc., waived any and all rights of redemption and or appraisal under the laws of the State of Arkansas. A copy of said deed of trust is attached hereto, made a part hereof, and marked Exhibit "B".

5. Under the terms of said note and deed of trust, the said defendants, The Development Company, Inc., Cecil Laughlin and James F. Taylor, agreed to make monthly payments of principal and interest in the amount of \$168.78, and in addition thereto agreed to pay monthly one-twelfth of the annual taxes and special assessments and one thirty-sixth of the three year hazard insurance premium, subject to such adjustments as might be necessary to meet the payments as they fell due.

6. Under the terms of said deed of trust it is provided that if the grantor fails to pay interest on said note when due, or fails to make payments on principal, hazard insurance, taxes or special assessments when due, then at the option of the grantee, all of the indebtedness secured by said deed of trust shall become due for all purposes and the Trustee may proceed to sell the property, or to foreclose the said deed of trust in any court of competent jurisdiction.

7. On July 27, 1956, Republic Mortgage Company, Inc. endorsed said note and assigned said deed of trust for value received to plaintiff, Pioneer American Insurance Company, Fort Worth, Texas, the assignment having been duly acknowledged and filed for record in the office of the re-



recorder for the Fort Smith District of Sebastian County, Arkansas, on August 7, 1956, where it now appears of record in Book 190 at page 10. A copy of said assignment is attached hereto, marked Exhibit "C", and made a part hereof.

8. On March 4, 1958, the defendant, The Development Company, Inc., executed, acknowledged and delivered to the defendant, Ocie A. Rogers and Florene W. Rogers, husband and wife, its corporation deed to the real property described in paragraph 2 above, which deed was filed for record in the office of the Recorder for the Fort Smith District of Sebastian County, Arkansas, on March 18, 1958, where it now appears of record in Book 158 at page 255. The said deed provides that it is given subject to the deed of trust held by the plaintiffs, hereinabove described, and the grantees assumed and agreed to pay the unpaid balance due thereunder.

9. On March 4, 1958, the defendants, Ocie A. Rogers and Florene W. Rogers, executed, acknowledged and delivered to the defendant, The Development Company, Inc., their mortgage on the real property hereinabove described to secure a promissory note of even date for \$2,500.00, with interest at five per cent, payable at the rate of \$50.00 per month, which mortgage was filed for record in the office of the Recorder for the Fort Smith District of Sebastian County, Arkansas, on March 18, 1958, where it now appears of record in Book 196 at page 164. Whatever right, title, interest, claim or lien the defendant, The Development Company, Inc., may have by virtue of said mortgage is subordinate and inferior to the first lien of the note and deed of trust of the plaintiff in this cause.

10. On March 16, 1960, the defendants, Ocie A. Rogers and Florene W. Rogers, executed, acknowledged and delivered to the defendants, Lee Davis and Jeff Davis, d b a J. S. Davis & Sons Lumber Company, their mortgage on the real property hereinabove described to secure a promissory note of even date for \$2,893.13, payable in 36 equal monthly installments of \$80.37 each, which mortgage was filed for record in the office of the recorder for the Fort Smith District of Sebastian County, Arkansas, on March

16, 1960, where it now appears of record in Book 214 at page 511. The said mortgage provides that it is given subject to the deed of trust held by the plaintiffs, hereinabove described. On March 16, 1960, the defendants, Lee Davis and Jeff Davis, partners, d b a J. S. Davis & Sons Lumber Company, assigned their said mortgage to the defendant, First Baneredit corporation, St. Paul, Minnesota, for stated value received, which assignment was filed for record with the recorder for the Fort Smith District of Sebastian County, Arkansas, on March 17, 1960, where it now appears of record in Book 214 at page 517. Whatever right, title, interest, claim or lien the defendants, Lee Davis and Jeff Davis, partners, d b a J. S. Davis & Sons Lumber Company and First Baneredit Corporation, St. Paul, Minnesota, may have by virtue of said mortgage and assignment is subordinate and inferior to the first lien of the note and deed of trust of the plaintiffs in this cause.

11. On April 18, 1960, the defendant, Alfred J. Anderson, d b/a Anderson Plumbing & Heating Company, filed a Mechanic's Lien against the defendants, Ocie A. Rogers and Florene W. Rogers, in the sum of \$446.35 for materials and labor alleged to have been furnished and used on improvements located on the real property described herein, said lien being filed with the Circuit Clerk and Recorder for the Fort Smith District of Sebastian County, Arkansas, where it now appears in Lien Book D at page 186. Whatever, right, title, interest, claim or lien the defendants, Alfred J. Anderson, d b/a Anderson Plumbing & Heating Company may have by virtue of said Mechanic's Lien is subordinate and inferior to the first lien of the note and deed of trust of the plaintiffs in this cause.

12. On November 29, 1960, the U. S. Treasury Department, District Director of Internal Revenue, Little Rock, Arkansas, filed its Notice of Federal Tax Lien No. 10,213 against the defendant, Florene W. Rogers, Florene's House of Beauty, 102 North 17th Street, Fort Smith, Arkansas, for Withholding Taxes for the taxable period ending June 30, 1960, in the sum of \$1,776.65 plus \$1.00 filing fee, where it now appears of record in the office of the Circuit Clerk and Recorder for the Fort Smith Dis-

trict of Sebastian County, Arkansas in Lien Book 2 at page 457 and Mechanic's Lien Book D at page 200. On January 30, 1961, the U. S. Treasury Department, District Director of Internal Revenue, Little Rock, Arkansas, filed its Notice of Federal Tax Lien, No. 10,743 against the defendant, Florene W. Rogers, Florene's House of Beauty, 403 Merchants National Bank Building, Fort Smith, Arkansas, for Withholding Taxes for the taxable period ending September 30, 1960, in the sum of \$1,567.14 plus \$1.00 filing fee. Both of the said alleged liens are subsequent and subordinate to the lien of the plaintiffs arising from the promissory note and deed of trust hereinabove described. The United States of America is joined as a defendant in this proceeding pursuant to the provisions of 28 USCA Section 2410.

13. The defendants, The Development Company, Inc., Cecil Laughlin and James F. Taylor, Ocie A. Rogers and Florene W. Rogers, have failed to make any payments

whatever on the promissory note and deed of trust

13 of the plaintiffs for the months of October, 1960,

through March, 1961, inclusive, although demand has

been made for such payments, and the said defendants are

now in default for principal in the sum of \$15,926.98. The

escrow account carried in connection with this loan is de-

ficient in the sum of \$212.90 by reason of advancements

made by these plaintiffs for hazard insurance premiums

and general taxes on the real property hereinabove de-

scribed, and plaintiffs are entitled to judgment in this cause

for such deficiency.

14. The plaintiffs elect to declare due the entire unpaid balance of said note in the amount of \$15,926.98, with interest thereon from September 1, 1960, until paid at the rate of six percent per annum, and the right of these plaintiffs to have foreclosure of said deed of trust has become absolute.

15. The plaintiff, George F. Carpenter, is merely the holder of the naked legal title to the said property for the purposes hereinbefore stated, and he has never had, nor has claimed, and does not now claim to have any interest therein, or in the obligation sued on, except as Trustee for Pioneer American Insurance Company.

WHEREFORE, Pioneer American Insurance Company prays judgment against the defendants, The Development Company, Inc., Cecil Laughlin & James F. Taylor, Ocie A. Rogers and Florence W. Rogers, jointly and severally, in the amount of \$15,926.98, with interest thereon from September

14 1. 1960 until paid at the rate of six per cent per annum, for the sum of \$612.90 escrow deficiency; for a reasonable attorney's fee as provided in its said promissory note; for its costs herein expended; and for interest upon said total judgment from the date of such judgment until paid at the rate of six per cent per annum.

The said plaintiff further prays that said judgment be declared a first lien on the property hereinbefore described; that if said judgment be not paid within a time to be fixed by the Court, that said property be sold free and clear of all liens to satisfy said judgment in the manner prescribed by law; that a Commissioner be appointed by this Court to conduct said sale, and that upon the report of said sale and the confirmation thereof by this Court, that all of the right, title, interest, lien claims, equity and/or right of redemption, and dower and homestead right of each of the defendants to the said property, be foreclosed and forever barred; that the alleged liens of the defendants, The Development Company, Inc., Lee Davis and Jeff Davis, partners d/b/a J. S. Davis & Sons Lumber Company, First Bancredit Corporation, Alfred J. Anderson, d/b/a Anderson Plumbing & Heating Company, and United States of America, be adjudged subsequent and subordinate to the lien of the plaintiffs, and that their right, title, interest, lien claims and/or right of redemption be determined and forever barred; and plaintiffs pray for all other relief to which they may in equity be entitled.

PIONEER AMERICAN INSURANCE  
COMPANY and GEORGE F. CAR-  
PENTER, Trustee, *Plaintiffs*

By: BETHELL & PEARCE

By /s/ LAWSON CLONINGER

(File endorsement omitted)

## Exhibit "A" to Complaint

## NOTE

Loan No. ....

\$20,000.00

May 24, 1956

FOR VALUE RECEIVED, the undersigned promise(s) to pay to the order of

## REPUBLIC MORTGAGE COMPANY, INC.

at its office in Fort Smith, Arkansas or at place of business of any subsequent legal holder hereof, the principal sum of Twenty Thousand and no 100 - - - - - (\$20,000.00) Dollars payable with interest thereon at 6% per annum payable from date

This note is payable as follows: Equal installments of principal and interest in the amount of One Hundred Sixty-eight and 78 100 Dollars on the first day of July, 1956 and a like sum upon the first day of each month thereafter until said interest and principal shall have been paid in full. The one hundred and eighty installments shall be applied, first, on the payment of earned interest and the remainder on the principal.

All past due principal and/or interest shall bear interest at the rate of ten per centum per annum.

If default shall be made in the payment of any installment of principal or interest on this note, then the unpaid principal of this note and all accrued interest hereon, shall, at the election of the legal holder hereof, become immediately due and payable without further notice. The undersigned also agree(s) that in the event of default herein and of the placing of this note in the hands of an attorney for collection, or this note is collected through any court proceedings, to pay a reasonable attorney's fee. Every endorser hereof waives presentment for payment, notice of dishonor, protest, and notice of protest, and consents to any extensions of term of payment granted by the holder hereof.

This note is secured by a first deed of trust of even date herewith on real estate situated in City of Fort Smith

County of Sebastian State of Arkansas and designated as:  
Lots Five (5) and Six (6) in Block Eighty-three (83) of  
Fitzgerald Addition to the City of Fort Smith, Sebastian  
County, Arkansas.

Witness the hand and seal of The Development Co.,  
Inc., a corporation, by its duly authorized Officers, pursuant  
to a resolution of the Board of Directors of said corpora-  
tion passed at a duly called and held meeting, this 24th  
day of May, 1956.

THE DEVELOPMENT CO., INC.,  
A Corporation

By: C. LAUGHLIN  
*Executive Vice President*

Attest:

JEAN POINDEXTER  
*Secretary*

CECIL LAUGHLIN  
Cecil Laughlin, Individually

JAMES F. TAYLOR  
James F. Taylor,  
Individually

16 During the first five years privilege is reserved to  
make additional payments on the principal of the note  
on any interest payment date provided that such additional  
payments, including obligatory principal payments, shall  
not exceed 1/5th of the original principal sum of the note  
during any one year period beginning at an anniversary of  
the note. Further privilege is reserved to pay more than  
1/5th of the principal sum in any one year upon the payment  
of a penalty equal to 3% of any amount in excess of said  
1/5th paid during any one year. After five years from date  
of this note, privilege is reserved to make payments in  
excess of obligatory principal payments without the pay-  
ment of any penalty. All prepayments shall be allowed only  
after 30 days written notice is given to holder of the note.

Witness the hand and seal of The Development Co.,  
Inc., a corporation, by its duly authorized officers, pursuant



to a resolution of the Board of Directors of said corporation passed at a duly called and held meeting, this 24th day of May, 1956.

THE DEVELOPMENT CO., INC.,

A Corporation

By: C. LAUGHLIN

*Executive Vice President*

Attest:

JEAN POINDEXTER

*Secretary*

CECIL LAUGHLIN

Cecil Laughlin, Individually

JAMES F. TAYLOR

James F. Taylor,

Individually

17

Exhibit "B" to Complaint

ARKANSAS

#4435

# DEED OF TRUST

DEVELOPMENT CO., INC.

To

REPUBLIC MORTGAGE COMPANY, INC.

This indenture, made and entered into this 24th day of May, 1956, by and between The Development Co., Inc., a Corporation party of the first part and George F. Carpenter Trustee, party of the second part, and Republic Mortgage Company, Inc., a Corporation having its principal office at Fort Smith, Arkansas, a party of the third part:

WITNESSETH, that the party of the first part in consideration of the debt and trust hereinafter mentioned and created, and the sum of One (\$1.00) Dollar to us in hand paid, the receipt of which is hereby acknowledged, and the further consideration of the facts hereinafter set forth, do hereby grant, bargain, sell, transfer, and convey unto



the party of the second part, his successors in trust, and assigns forever, the following described land situated and lying in the State of Arkansas, County of Sebastian, City of Fort Smith, to wit: Lots Five (5) and Six (6) in Block Eighty-three (83) of Fitzgerald Addition to the City of Fort Smith, Sebastian County, Arkansas.

together with all the improvements, appurtenances and privileges thereunto belonging, including all plumbing, lighting and heating fixtures now or hereafter attached to or used in connection with said premises, and all rents, issues and profits which may arise or be had thereafter, and if the property is used for business purposes, all machinery, fixtures and chattels which are used for the purpose of such business, whether attached to the freehold or not.

TO HAVE AND TO HOLD THE SAME TO THE PARTY OF THE SECOND PART, his successors in trust, and assigns, forever.

AND the party of the first part covenants with the party of the second part, his successors in trust, and assigns, that *his* is lawfully seized in fee of said premises, that the same are free and clear of all taxes, liens, and encumbrances whatsoever, that he has a good right, full power and lawful authority to convey the same, and that he will warrant and forever defend the title thereto against the lawful claims of any and all persons whatsoever.

This conveyance is made in trust, however, to secure the payment of a promissory note of even date herewith, the terms of which are incorporated herein by reference, the principal sum of Twenty Thousand and no/100 Dollars, with interest from date at the rate provided in said note. The said principal and interest shall be payable at said principal office of the party of the third part, or at such other place as the holder of the note may designate in writing, as follows: Payable in one hundred and eighty equal monthly installments on the first day of each calendar month, beginning on the first day of July, 1956, each payment in the sum of One Hundred Sixty-eight and 78/100 Dollars.

In addition to the regular loan payments to principal and interest, monthly deposits shall be made equal to  $1/12$  of all annual taxes and special assessments and  $1/36$  of the 3 year hazard insurance premium.

In the event of default and foreclosure of this deed of trust, any unexpended funds in the hands of the party of the third part deposited by the party of the first part to meet the obligations of taxes, assessments and hazard insurance, shall be applied and credited by the party of the third part upon the debt hereby secured in the following order:

18. (1) Interest on advances made by the party of the third part;
- (2) Advances made by the party of the third part;
- (3) Interest on principal; and
- (4) The principal debt hereby secured.

And the party of the first part, in order more fully to protect the security of this Deed of Trust, does hereby covenant and agree as follows: To pay the indebtedness, as hereinbefore provided.

Party of the first part further covenants and agrees to pay all of the taxes, assessments, rents and other Governmental or Municipal charges, fines or impositions and ground rents, whether levied or assessed upon the premises secured hereby, or upon the interest of the party of the third part therein, except in the case of the Federal or State Income Tax upon the note and deed of trust or upon the interest of the party of the third part in the same, for which provision has not been made hereinbefore, and that the party of the first part will promptly deliver the official receipts therefor to the party of the third part; and in default thereof the party of the third part shall have the right to pay the same. If the party of the first part shall fail to pay any fire or other hazard insurance premiums, or shall fail to pay for any necessary repairs, the party of the third part shall have the right to pay the same, and all sums so advanced shall be secured hereby and shall bear interest at the rate of six per centum (6%)

per annum from the date when paid. The party of the third part shall have the right to make any payment which the party of the first part should have made, and the party of the third part may also pay any other sum that is necessary to protect the security of this instrument. All such sums, as well as all costs paid by the party of the third part pursuant to this instrument, shall be secured hereby and shall bear interest at the rate of six per centum (6%) per annum from the date when any such sums are paid. Any and all sums paid by the party of the third part under the provisions of this paragraph shall, together with the interest, be repaid to the party of the third part upon demand, and upon the failure of the party of the first part to so repay such sums within thirty days after such demand, then all sums owing to the party of the third part by the party of the first part under this deed of trust and note secured hereby, shall immediately become due at the option of the party of the third part, and this deed of trust shall be subject to foreclosure.

Said party of the first part will keep the improvements now existing or hereafter erected on the said premises, insured as may be required from time to time by the party of the third part against loss by fire and other hazards, casualties, and contingencies in such amounts and for such periods as may be required by the party of the third part and will pay promptly, when due, any premiums on such insurance, provision for payment of which has not been made hereinbefore. All insurance shall be carried in companies approved by the party of the third part and the policies and renewals thereof shall be held by the party of the third part and have attached thereto loss payable clause in favor of and in form acceptable to the party of the third part. It is also agreed that in case of the pending expiration of any policy a renewal thereof with receipt for premium on same shall be delivered to the party of the third part at least ten days before time of such expiration. In event of loss the party of the first part will give immediate notice by mail to the party of the third part, who may make proof of loss if not made promptly by the party of the first part, and each insurance company concerned is hereby authorized and directed to

make payment for such loss directly to the party of the third part instead of the party of the first part and the party of the third part jointly, and the insurance proceeds, or any part thereof, may be applied by the party of the third part at its option either to the reduction of the indebtedness hereby secured or to the restoration or repair of the property damaged. In event of foreclosure of this deed of trust or other transfer of title to the said premises in extinguishment of the indebtedness secured hereby, all right, title, and interest of the party of the first part in and to any insurance policies then in force shall pass to the purchaser.

That if either the party of the second part or the party of the first part shall become a party to any suit or proceeding at law or in equity in reference to its interest in the premises herein conveyed, the reasonable costs, charges and attorney's fees in such suit or proceeding shall be added to the principal sum then owing to the party of the first and shall be secured by this instrument, and the note secured hereby shall, at the option of the holder, become due and collectible.

That party of the first part will keep the said premises in as good order and condition as they are now and will not commit or permit any waste thereof, reasonable wear and tear excepted.

NOW THEREFORE, if the party of the first part shall well and truly perform all the terms and conditions of this deed of trust, and of the note secured hereby, then this conveyance shall be null and void, and shall be released or satisfied at the request of the party of the first part. If, however, there shall be a default under this deed of trust, or under the note secured hereby, then all sums owing by the party of the first part to the party of the third part under this deed of trust, or under the note secured hereby, shall immediately become due and payable at the option of the party of the third part, and the party of the second part is hereby empowered and authorized to advertise said property once a week for four consecutive weeks, giving notice of the time, place and terms of sale, in some newspaper published in the County in which said tract (or

tracts) above described is (are) located, to sell the property at public outcry to the highest and best bidder for cash. Upon such sale, the party of the second part is hereby authorized to execute and deliver a deed of conveyance in fee of said property to the purchaser thereof, and to place the purchaser in quiet and peaceful possession of the property. The party of the first part agrees that in case of any sale under this deed of trust said party of the first part will at once surrender possession of the property, and will from that moment become and be a tenant at will of the purchaser, and be removable by process, such as forcible and unlawful detainer, hereby agreeing to pay to the purchaser the reasonable rental value of the property after such sale. The party of the third part, its successors or assigns, may bid at the sale and purchase the said property, if the highest bidder therefor.

The proceeds of any sale under this deed of trust shall be applied by the party of the second part as follows:

First: To pay the costs and expenses of executing this trust, and any and all sums expended on account of costs of litigation, attorney's fees, ground rents, taxes, insurance premiums, or any advances made or expenses incurred on account of the property sold, with interest thereon.

Second: To retain as compensation, a commission as set forth by the laws of the State of Arkansas.

Third: To pay off the debt secured hereby, including accrued interest thereon, as well as any other sums owing to the party of the third part or the party of the first part, pursuant to this instrument.

And last, to pay the balance, if any, to the party of the first part upon delivery and surrender to the purchaser of possession of the party sold, less the expense, if any, of obtaining possession.

20 Should the party of the first part apply to the bankruptcy court to be adjudicated a voluntary bankrupt, or proceedings to be instituted against said party of the first part in involuntary bankruptcy, or should any proceedings be taken against said party of the first part looking to the appointment of a receiver for the party of

the first part, that then and in either or any such case, the whole indebtedness hereby secured shall at once become due and this deed of trust shall be subject to foreclosure, at the option of the party of the third part.

The party of the third part, its assigns, or any holder of the note secured by this deed of trust may at any time, with or without cause, and at its pleasure and without notice either to the party of the second part and or party of the first part, remove the Trustee herein named and may appoint a successor by an instrument in writing which shall be recorded in the same county and State in which this instrument is recorded, and the Successor Trustee so appointed shall succeed to all rights, titles, and powers and be subject to all of the same obligations and duties, waivers and immunities, conferred upon the Trustee herein named, and no resignation, evidence of inability, or failure to function or evidence of absence of the Trustee herein named shall be required, and such like powers of substitution shall continue so long as any part of the debt secured hereby remains unpaid. It is a condition of this conveyance that the party of the first part shall retain possession of the property hereby conveyed until there is a default under this deed of trust, or under the note secured hereby, after such default, the party of the second part, or the party of the third part, shall have the right to collect the rents, issues, and profits of the property. In the event of such default, the party of the second part in addition to the power of sale as provided above, shall have the right to proceed in a court of equity to foreclosure this deed of trust and shall be entitled to the appointment of a receiver to collect the rents, issues, and profits of the property, pending such sale.

During the first five years privilege is reserved to make additional payments on the principal of the note on any interest payment date provided that such additional payments, including obligatory principal payments, shall not exceed 1/5th of the original principal sum of note during any one year period beginning at an anniversary of the note. Further privilege is reserved to pay more than 1/5th of the principal sum in any one year upon the payment of a penalty equal to 3% of any amount in excess of said 1/5th paid during any one year. After five years from



date of this note, privilege is reserved to make payments in excess of obligatory principal payments without the payment of any penalty. All prepayments shall be allowed only after 30 days written notice is given to holder of the note.

Witness the hand and seal of The Development Co., Inc., a corporation, by its duly authorized officers, pursuant to a resolution of the Board of Directors of said corporation passed at a duly called and held meeting, this 24th day of May, 1956.

(SEAL)

THE DEVELOPMENT CO., INC.,  
A Corporation

By: C. LAUGHLIN  
*Executive Vice President*

Attest:

JEAN POINDEXTER  
*Secretary*

The party of the first part hereby waive all right of appraisement, sale, homestead, or redemption allowed under any law or laws of the State of Arkansas, and especially under the Act of the General Assembly of the State of Arkansas approved May 8, 1899. The party of the first part also waive any defense to the note herein described that may based upon any extension of time of payment thereof to any person who subsequently assumes or becomes liable for the payment of the indebtedness herein described, regardless of whether said extension is granted with or without the knowledge or consent of the party of the first part.

21 The covenants herein contained shall bind, and the benefits and advantages shall inure to the respective heirs, executors, administrators, successors and assigns of the parties hereto. Whenever used, the singular number shall include the plural, the plural the singular, and the use of any gender shall be applicable to all genders.

Witness the hand and seal of The Development Co., Inc., a Corporation, by its duly authorized officers, pursuant



to a resolution of the Board of Directors of said corporation passed at a duly called and held meeting, this 24th day of May, 1956.

(SEAL)

THE DEVELOPMENT CO., INC.,  
A Corporation

By: C. LAUGHLIN  
*Executive Vice President*

Attest:

JEAN POINDEXTER, *Secretary*

STATE OF ARKANSAS }  
COUNTY OF SEBASTIAN } ss

On this 24th day of May, 1956, before me the undersigned a Notary Public, duly commissioned, qualified and acting, within and for said County and State, appeared in person the within-named C. Laughlin and Jean Poindexter, to me personally well known, who stated that they were the Executive Vice President and Secretary of The *Development Co., Inc.*, a corporation, and were duly authorized in their respective capacities to execute the foregoing instrument for and in the name and behalf of said corporation, and further stated and acknowledged that they had so signed, executed and delivered said foregoing instrument for the consideration, uses and purposes therein mentioned and set forth.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal this 24th day of May, 1956.

(SEAL)

NYLAH ERKE  
*Notary Public*

My Commission expires: 9-19-59

Filed for record this 7th day of June 1956, at 3:31 o'clock P. M.

PAUL P. PACE  
*Clerk & Ex-Officio Recorder*

By SUE SPRINGWATER D.C.

## ASSIGNMENT OF DEED OF TRUST

REPUBLIC MORTGAGE COMPANY, INC.

To

PIONEER AMERICAN INSURANCE CO.

STATE OF ARKANSAS }  
COUNTY OF SEBASTIAN } ss

KNOW ALL MEN BY THESE PRESENTS: That the undersigned Republic Mortgage Company, Inc., of Fort Smith, Arkansas, a corporation organized and existing under the laws of Arkansas, for value received, does grant, bargain, sell, convey and assign unto Pioneer American Insurance Company, Fort Worth, Texas all its right, title, and interest in and to a certain deed of trust executed to it by The Development Company, Inc., a Corporation and recorded in Book 186, Page 490, in the Circuit Clerk's Office of Sebastian County, Arkansas, together with the debt secured thereby, the property encumbered by said deed of trust being briefly described, to-wit:

Lots Five (5) and Six (6) in Block Eighty-three (83) of Fitzgerald Addition to the City of Fort Smith, Sebastian County, Arkansas.

Without recourse against said Republic Mortgage Company, Inc., of Fort Smith, Arkansas, except as follows:

The undersigned Republic Mortgage Company, Inc., warrants that there remains unpaid on the note secured by said deed of trust and assigned by this instrument the principal sum of Nineteen Thousand Nine Hundred Thirty One and 22/100 Dollars, plus interest at the rate of of Six per cent (6%), per annum, from the 1st day of July, 1956, and further warrants to and covenants with Pioneer American Insurance Company, Assignee herein, that it has not, at any time, released any portion of the indebtedness, or released, altered or impaired the personal liability

ties of any party to the note described, or in any manner released, altered, or impaired any of the covenants or agreements of said deed of trust and note, and that, to its best knowledge and belief, there are no defenses, offsets, or counterclaims to the said indebtedness or to the note evidencing the same or to the aforesaid deed of trust; and that it has never been a party plaintiff or defendant in litigation of any nature affecting said mortgage loan or indebtedness.

IN WITNESS WHEREOF, the said Republic Mortgage Company, Inc., has caused this instrument to be signed by C. Laughlin, its President, and attested by Jean Poindexter, Secretary, and its Corporate Seal to be hereto affixed this 27th day of July, 1956.

REPUBLIC MORTGAGE COMPANY, INC.

(SEAL)

By C. LAUGHLIN  
C. Laughlin, *President*

Attest:

JEAN POINDEXTER  
Jean Poindexter, *Secretary*

STATE OF ARKANSAS     }  
COUNTY OF SEBASTIAN } ss

On this 27th day of July, 1956, before me, the undersigned a Notary Public, duly commissioned, qualified and acting, within and for said County and State, appeared in person the within named C. Laughlin and Jean Poindexter to me personally well known, who stated that they were the President and Secretary of the Republic Mortgage Company, Inc., and were fully authorized in their respective capacities to execute the foregoing instrument for and in the name and behalf of said corporation, and further stated and acknowledged that they had so signed, executed and delivered said foregoing instrument for the consideration, uses and purposes therein mentioned and set forth.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal this the 27th day of July, 1956.

(SEAL)

NYLAH ERKE  
Notary Public

Commission expires:  
9-19-59

Filed for record on this the 7th day of August, 1956, A. D.,  
at 2:11 o'clock P.M.

PAUL P. PACE  
Clerk and Ex-Officio Recorder

By SUE SPRINGWATER D.C.

40 IN THE CHANCERY COURT OF SEBASTIAN COUNTY, ARKANSAS  
FORT SMITH DISTRICT

(Title omitted)

**Separate Answer of United States of America**

Comes now the United States<sup>a</sup> of America and for its separate Answer states:

1. Defendant admits the execution of the plaintiff's note and mortgage but denies the lien of the same is prior to lien of the United States of America as applied to taxes and insurance paid subsequent to the filing of the liens hereinafter described and as to attorneys fees.

2. Defendant, United States of America, further shows that on November 29, 1960, pursuant to law, Notice of Federal Tax Lien No. 10,213 was filed against the defendant Florene W. Rogers for withholding taxes for the period ending June 30, 1960, in the sum of \$1,776.65, plus \$1.00 filing fee, and there remains due for the withholding taxes for said period the sum of \$1,608.62 plus interest at the rate of 6% per annum from September 2, 1960.

41 3. Defendant, United States of America, further shows that on January 30, 1961, through its agents filed Federal Tax Lien No. 10,743 against the defend-

ant Florene W. Rogers in the amount of \$1,567.14, plus \$1.00 filing fee, for non-payment of withholding tax for the period ending September 30, 1960, and there is now due on said taxes the sum of \$1,562.53, plus interest from October 31, 1960; until paid.

WHEREFORE, the defendant United States prays that priority be established and in the event of sale at foreclosure of the property involved in an amount in excess of the principal and interest of plaintiff's note and mortgage that the balance be impounded in the registry of the court pending an order of determining the parties, or parties, entitled to, and such other relief to which it might be entitled.

UNITED STATES OF AMERICA

CHAS. W. ATKINSON

*United States Attorney*

By /s/ ROBERT E. JOHNSON

Robert E. Johnson

*Assistant U. S. Attorney*

---

CERTIFICATE  
(Omitted in printing)

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61 IN THE CHANCERY COURT OF SEBASTIAN COUNTY, ARKANSAS  
FOR SMITH DISTRICT

No. 570

PIONEER AMERICAN INSURANCE COMPANY and GEORGE F.  
CARPENTER, TRUSTEE FOR PIONEER AMERICAN INSURANCE  
COMPANY, *Plaintiffs*

vs.

THE DEVELOPMENT COMPANY, INC., a corporation; CECIL  
LAUGHLIN; JAMES F. TAYLOR; OCIE A. ROGERS and  
FLORENE W. ROGERS; LEE DAVIS and JEFF DAVIS, part-  
ners d/b/a J. S. Davis & Sons Lumber Company; First  
Baneredit Corporation; ALFRED J. ANDERSON d/b/a  
Anderson Plumbing & Heating Company; UNITED  
STATES OF AMERICA; GALEN F. SCHLUND and ART  
LUNDREN; and ARKANSAS SCHOOL OF COSMETOLOGY, INC.,  
*Defendants*

THE DEVELOPMENT COMPANY, INC., a corporation,  
*Cross Claimant.*

**Answer and Cross Complaint—Filed June 20, 1961**

Comes now The Development Company, Inc. and for  
response to the complaint of the plaintiff, alleges and states  
as follows:

1. Admits the allegations of the complaint.
2. Admits the allegations of the amendment to complaint,  
joining Galen F. Schlund as defendant.
3. Admits the allegations of the amendment to complaint,  
joining Art Lundren as defendant.

Further pleading, The Development Company, Inc., for  
its cross-complaint against the defendants Ocie A. Rogers  
and Florene W. Rogers; Lee Davis and Jeff Davis,  
62 partners d/b/a J. S. Davis & Sons Lumber Company;  
First Baneredit Corporation; Alfred J. Anderson,  
d/b/a Anderson Plumbing & Heating Company; United  
States of America; Galen F. Schlund; Arkansas School of  
Cosmetology, Inc. and Art Lundren, alleges and states  
as follows:



4. On March 4, 1958, the defendants Ocie A. Rogers and Florene W. Rogers became indebted to The Development Company, Inc. in the amount of \$2,500.00, evidenced by their promissory note for that amount, with interest at the rate of five per cent per annum, payable at \$50.00 per month beginning March 1, 1958. A copy of said note is attached hereto, made a part hereof, and marked Exhibit "A".

5. To secure the payment of said note, the defendant Ocie A. Rogers and Florene W. Rogers on March 4, 1958, executed, acknowledged and delivered to The Development Company, Inc., their mortgage on the following described real property:

Lots Five (5) and Six (6) in Block Eighty-three (83) of Fitzgerald Addition to the City of Fort Smith, Sebastian County, Arkansas.

Said mortgage was filed for record in the office of the recorder for the Fort Smith District of Sebastian County, Arkansas, on March 18, 1958, where it now appears of record in Book 196 at page 164..

6. In said mortgage the defendants Ocie A. Rogers and Florene W. Rogers waived any and all rights of redemption and or appraisement under the laws of the State of Arkansas. A copy of said mortgage with power of sale is attached hereto, made a part hereof, and marked Exhibit "B".

63 7. Under the terms of said note and mortgage, the defendants Ocie A. Rogers and Florene W. Rogers agreed to make monthly payments of principal and interest in the amount of \$50.00 per month beginning March 4, 1958. The mortgage provides that if the grantor shall fail to pay the indebtedness secured at the time and in the manner provided, the grantee or its assigns shall have the right and power to foreclose the lien of said mortgage.

8. The defendants Ocie A. Rogers and Florene W. Rogers made certain payments on said note reducing the principal due to \$1,846.50, but said defendants have failed and neglected to make payments of installments due August 4, 1959, and thereafter to this date, although demand therefor has been made, and the said defendants are now



in default since August 4, 1959, and in fact said defendants were delinquent in making payments up to August 4, 1959, and the entire unpaid principal balance in the net amount of \$1,846.50 is now due, together with interest on said balance in the amount of \$180.07 as of May 12, 1961.

9. Cross-claimant adopts the allegations of paragraph 10 of plaintiff's complaint, alleging the execution by defendant Ocie A. Rogers and Florene W. Rogers of a real estate mortgage to Lee Davis and Jeff Davis, d/b/a J. S. Davis & Sons Lumber Company, and allege that said mortgage is subordinate and inferior to the rights of cross-claimant.

64 10. Cross-claimant adopts the allegations of paragraph 11 of the plaintiff's complaint, alleging the filing of a mechanic's lien against the defendants Ocie A. Rogers and Florene W. Rogers by Alfred J. Anderson, d/b/a Anderson Plumbing & Heating Company, and alleges that said mechanic's lien is subordinate and inferior to the rights of the cross-claimant.

11. Cross-claimant adopts the allegations of paragraph 12 of plaintiff's complaint, namely that on November 29, 1960, the U. S. Treasury Department, District Director of Internal Revenue, Little Rock, Arkansas, filed its Notice of Federal Tax Lien No. 10,213 against the defendant Florene W. Rogers, Florene's House of Beauty, 102 North 17th Street, Fort Smith, Arkansas, for withholding taxes for the taxable period ending June 30, 1960, in the sum of \$1,776.65 plus \$1.00 filing fee, where it now appears of record in the office of the Circuit Clerk and Recorder for the Fort Smith District of Sebastian County, Arkansas in Lien Book 2 at page 457 and Mechanic's Lien Book D at page 200. On January 30, 1961, the U. S. Treasury Department, District Director of Internal Revenue, Little Rock, Arkansas, filed its Notice of Federal Tax Lien, No. 10743, against the defendant, Florene W. Rogers, Florene's House of Beauty, 403 Merchants National Bank Building, Fort Smith, Arkansas, for withholding taxes for the taxable period ending September 30, 1960, in the sum of \$1,567.14 plus \$1.00 filing fee. Additionally, cross-claimant states that on April 14, 1961, the United States Treasury Department, District Director of Internal Revenue, Little Rock, Arkansas, filed

65 its Notice of Federal Tax Lien No. 11,214 against the defendant Florene W. Rogers, Florene's House of Beauty, 403 Merchants National Bank Building, Fort Smith, Arkansas, for withholding taxes for the taxable period ending December 31, 1960, in the sum of \$1,288.96 plus \$1.00 filing fee, where it now appears of record in the office of the Circuit Clerk and Recorder for the Fort Smith District of Sebastian County, Arkansas, in Lien Book 2 at page 487 and Mechanic's Lien Book D at page 210. All of such tax liens set forth above are all subsequent and subordinate to the lien of the cross-claimant arising from the promissory note and mortgage hereinabove described. The United States of America is joined as a cross-defendant in this cross-claim pursuant to the provisions of 28 U.S.C. Section 2410.

12. Cross-claimant adopts the allegations of the first amendment to plaintiff's complaint, joining Galen F. Schlund, d/b/a Arkansas School of Cosmetology, as a defendant. The cross-claimant further alleges that whatever right, title, interest or lease, that the said Galen F. Schlund, d/b/a Arkansas School of Cosmetology, may have in the real property described in paragraph 5 of this cross-complaint, is subordinate and inferior to the rights of the cross-claimant. Cross-claimant further states that Arkansas School of Cosmetology, Inc., an Arkansas corporation, is now in possession of the real property described in paragraph 5 of this cross-complaint, or else has a contract for possession thereof. The lease of Galen F. Schlund has been assigned to said Arkansas School of Cosmetology,

66 Inc., or else will be assigned to said corporation pursuant to an agreement between said corporation and Galen F. Schlund. The cross-claimant further alleges that whatever right, title, interest, or lease, that the said Arkansas School of Cosmetology, Inc. may have in the real property described in paragraph 5 of this cross-complaint, or may hereafter acquire in said property, is subordinate and inferior to the rights of the cross-claimant.

13. Cross-claimant adopts the allegations of the second amendment to the plaintiff's complaint, alleging the filing of a mechanic and materialman's lien against the defendants Ocie A. Rogers and Florene W. Rogers by Art Lundren,

and alleges that said mechanic's lien is subordinate and inferior to the rights of the cross-claimant:

WHEREFORE, cross-claimant, The Development Company, Inc. prays judgment against the defendants Ocie A. Rogers and Florene W. Rogers, jointly and severally, in the amount of \$1,846.50 with interest thereon in the amount of \$180.07 as of may 12, 1961, and thereafter at the rate of five per cent per annum until judgment; for its costs herein expended; and for interest upon said total judgment from the date of such judgment until paid at the rate of six per cent per annum.

The said cross-claimant further prays that said judgment be declared a lien on the property hereinbefore described; that such lien be decreed to be subject and subordinate only to the lien of the plaintiff, Pioneer American Insurance Company, and prior and paramount to all right, title, 67 claim, interest, equity, or right of redemption, or right of dower and homestead, of the cross-defendants or any one of them; that if the judgment of this court in favor of the cross-claimant not be paid within a reasonable time, that a commissioner be appointed to sell the property herein described, or so much thereof as may be necessary to satisfy the cross-claimant's judgment; that if the proceeds of the same be not sufficient to satisfy such judgment, that the cross-claimant have judgment against the defendants Ocie A. Rogers and Florene W. Rogers in personam; that all the rights of the defendants Lee Davis and Jeff Davis, partners d/b/a J. S. Davis & Sons Lumber Company; First Bancredit Corporation; Alfred J. Anderson d/b/a Anderson Plumbing & Heating Company; United States of America; Galen F. Schlund; Art Lundren, and Arkansas School of Cosmetology, Inc. be foreclosed and forever barred, and for all other relief to which it may be entitled in the premises.

THE DEVELOPMENT COMPANY, INC.

By/s/ JAMES F. TAYLOR, V. Pres.

(File endorsement omitted)

## ARKANSAS NOTE.

六、施工 5 月 20 日 6 时 30 分 6 时 30 分

100-441770-100

Author:  Title:

personality tests 14      504.3

an Enforcement Counsel, Inc.

[illegible]

— 200 —

FOX SMITH, ARTHUR

[illegible]

James H. Fowler, *University of Minnesota*

gender: male, female; age: 18-24, 25-34, 35-44, 45-54, 55-64, 65-74, 75-84, 85-94; education: less than high school, high school, some college, college, postgraduate; marital status: married, divorced, widowed, never married; race: white, black, hispanic, other; income: less than \$10,000, \$10,000-\$14,999, \$15,000-\$24,999, \$25,000-\$34,999, \$35,000-\$49,999, \$50,000-\$74,999, \$75,000-\$99,999, \$100,000+; region: north, south, west, midwest; and season: winter, spring, summer, fall.

DATE: 11/11/2011

# Harmon & Anderson

## MORTGAGE---With Power of Sale

Know All Men by These Presents: That we Ocie A. Rogers  
and Florence W. Rogers, his wife, MORTGAGORS, of the County of  
Sebastian State of Arkansas, for and in consideration of the sum of  
One Dollar and other valuable considerations ----- DOLLARS  
to us in hand paid by The Development Company, Inc. of Fort Smith,  
in the State of Arkansas MORTGAGOR, the receipt whereof is hereby acknowledged, have  
Granted, Bargained and Sold, and do hereby Grant, Bargain, Sell and Convey unto the said MORTGAGOR and unto its  
HEIR/successors and assigns the following described Real Estate, situate in Sebastian County, State of  
Arkansas, and in City of Fort Smith to-wit:

Lots Five (5) and Six (6) in Block Eighty-three (83) of  
Fitzgerald Addition to the City of Fort Smith, Arkansas

TO HAVE AND TO HOLD the same unto the said MORTGAGOR and unto its ~~HEIR~~/successors and assigns  
forever, with all the privileges and appurtenances thereto belonging.

And us, the said MORTGAGORS, for our heirs, executors, administrators and assigns, covenant with the  
said MORTGAGOR its HEIR/successors and assigns, that we ~~us~~ are lawfully seized in fee of the  
aforesaid premises; that they are free from all incumbrances, that we have good right to sell and convey  
the same to the said MORTGAGOR as aforesaid, and that us ~~we~~ and our heirs, executors and admin- (69)  
istrators shall forever warrant and defend the title to the said Real Estate against all lawful claims and demands whatever.

And I, the said Florence W. Rogers, wife of the said  
Ocie A. Rogers, for and in consideration of said  
sum of money, do hereby join in this conveyance, and for the consideration aforesaid do hereby release and quitclaim, trans-  
fer and relinquish unto said MORTGAGOR and unto its HEIR/successors and assigns, all my right, claim or re-  
sidualty of dower and homestead in or to said lands.



TO HAVE AND TO HOLD the same unto the said MORTGAGOR and unto its HEIR/successors and assigns forever, with all the privileges and appurtenances thereto belonging.

And WE the said MORTGAGORS, for our heirs, executors, administrators and assigns, covenant with the said MORTGAGOR its HEIR/successors and assigns, that WE ARE lawfully seized in fee of the abovesaid premises; that they are free from all incumbrances, that WE have good right to sell and convey the same to the said MORTGAGOR as aforesaid, and that WE WILL and OUR heirs, executors and administrators shall forever warrant and defend the title to the said Real Estate against all lawful claims and demands whatsoever.

And I, the said Florence W. Rogers, wife of the said Ocie A. Rogers, for and in consideration of said sum of money, do hereby join in this conveyance, and for the consideration aforesaid do hereby release and quitclaim, transfer and relinquish unto said MORTGAGOR and unto its HEIR/successors and assigns, all my right, claim or possibility of dower and homestead in or to said lands.

The foregoing conveyance is on condition: That, Whereas, the said MORTGAGORS are justly indebted to the said MORTGAGOR in the sum of Two Thousand Five Hundred and no/100----- DOLLARS for value received evidenced by one note of even date in the amount of \$2,500.00 and bearing interest at 5%. Said note being payable at \$50.00 per month beginning March 1, 1938

Now, if the said MORTGAGORS shall pay or cause said indebtedness to be paid, with interest, according to the terms thereof, and all other indebtedness of the MORTGAGORS to the MORTGAGOR, then this instrument to be null and void; otherwise to remain in full force and effect.

AND IT IS HEREBY FURTHER STIPULATED, that during the continuance of this instrument in force, the said MORTGAGORS shall at all times keep the State, County and City taxes and assessments for local improvements on said premises fully paid as required by law, and shall keep the buildings on said premises insured in some approved fire insurance company, or companies, against loss or damage by fire, or storm, with extended coverage, to a sum of not less than \_\_\_\_\_ with Standard Mortgage Charge, providing that the loss, if any, shall be payable to the MORTGAGOR, or the legal holder of said indebtedness, as their interest may appear.

AND IT IS FURTHER STIPULATED, that in case the MORTGAGORS shall make default in payment of taxes, or assessments for local improvements or other purposes, or fail to keep the premises insured as above provided, then the said MORTGAGOR or the legal holder thereof may pay such taxes and assessments, or procure such insurance, and the amount expended therefor, with interest at ten per cent per annum from date of such expenditure until repaid, shall be considered a sum the repayment of which is intended to be hereby secured.

And if default be made in payment of the indebtedness hereby secured, or any installment due under the terms thereof, at maturity, or of any interest payment when due, or the terms aforesaid, or any part of either, or if taxes be committed on or improvements are removed from the land without written consent of the MORTGAGOR or assigns, or if the MORTGAGORS become insolvent, then, in any or either of such events, the whole of the sums intended to be hereby secured shall at the option of the MORTGAGOR, or the legal holder of said indebtedness, become immediately due and payable, and the MORTGAGOR, or the legal holder of said indebtedness, without notice or demand, may proceed to foreclose this mortgage.

All right of agreement and redemption provided by the laws of Arkansas are hereby waived by the MORTGAGORS.

IN WITNESS WHEREOF the MORTGAGORS have hereunto set their hands and private seals this 28 day of March 1938

Ocie A. Rogers (SEAL)  
Florence W. Rogers (SEAL)  
Florence W. Rogers (SEAL)

(69)

Exhibit "B" to Answer

28

## ACKNOWLEDGMENT

STATE OF ARIZONA  
County of Maricopa Section 1

On this 4th day of March 1958, before me, the undersigned  
notary public within and for the County of Sebastian in the State of  
Arkansas, duly commissioned and acting, appeared in person Ocie A. Rogers  
and Florence W. Rogers to me personally well known as the person<sup>s</sup> whose name<sup>s</sup>  
 appear upon the within and foregoing mortgage as the grantee<sup>s</sup> and stated that he<sup>s</sup> had  
 executed the same for the consideration and purpose therein mentioned and set forth, and I do so certify.

And I further certify that on the same day voluntarily appeared before me.

**Elvira L. Rivera**

**Oct 10 A. Reports**

upon the title and foregoing mortgage, and, in the absence of her said husband, stated and declared that she had of her own free will executed the same and had signed the relinquishment of dower and homestead therein expressed, for the purpose and consideration therein contained and set forth, without compulsion or undue influence of her said husband.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal of office as such Notary public

Wigwago County and State approved on this 4th day of March 19 58

My Commission expires October 14 1960

## Jeffrey Schultz

# CERTIFICATE OF RECORD

STATE OF ARKANSAS  
County of Sebastian

I, Otis O. Harris, Jr. Circuit Clerk and ex-Officio Recorder of the County, do hereby certify that the annexed and foregoing instrument of writing was filed for record in my office on the 18 day of March, A. D. 1958, at 8:06 o'clock A. M., and the same is now duly recorded with the acknowledgments and certificates thereon, in "Record Book 158" page       

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 18 day of March A. D. 19 58

OTIS O. HARRIS, JR

**Circuit Clerk and ex-Officio Recorder**

**Deputy Clerk**



# CERTIFICATE OF RECORD.

STATE OF ARKANSAS  
County of Sebastian } ss.  
I, Otis O. Harris, Jr. Circuit Clerk and ex-Office Recorder of the County aforesaid  
do hereby certify that the annexed and foregoing instrument of writing was filed for record in my office on the 18  
day of March A. D. 1958 at 8:06 o'clock A. M., and the same is now duly recorded with the  
acknowledgments and certification thereon, in "Record Book 158" - page \_\_\_\_\_  
IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 18 day  
of March A. D. 1958

OTIS O. HARRIS, JR.  
Circuit Clerk and ex-Office Recorder  
By Walter S. Sullivan Deputy Clerk

2007-196-

2807  
**REAL ESTATE MORTGAGE**  
**With Power of Sale**

Ocie A. Rogers

Florence V. Rogers

TO

The Development Company, Inc.

Filed for record on this 18 day  
of March 1958 at  
8 o'clock AM M.

Recorded in \_\_\_\_\_

Page \_\_\_\_\_

Otis O. Harris, Jr.  
Circuit Clerk and ex-Office Recorder

By \_\_\_\_\_

D. C.

(71)

*Heave to  
24 Nov 6*

## FOR VALUE RECEIVED

the within-named mortgagor, do hereby sell, assign and transfer to  
this mortgage and the notes secured herein, without recourse on \_\_\_\_\_

Assignment endorsed on record \_\_\_\_\_ 19 \_\_\_\_\_

## SATISFACTION

The note herein described, having been paid in full, this mortgage is hereby released and the lien thereby created  
discharged.

WITNESS \_\_\_\_\_ hand \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_

Release endorsed on record \_\_\_\_\_ 19 \_\_\_\_\_

95 IN THE CHANCERY COURT OF SEBASTIAN COUNTY,  
ARKANSAS, FORT SMITH DISTRICT

(Title Omitted)

**Separate Answer of United States to Cross Complaint—  
Filed July 11, 1961**

Comes now the defendant, United States of America, and for its separate answer to the Cross-Complaint of the Development Company states:

1. That not having information on which to form a belief denies all of the allegations not herein specifically admitted.

2. The defendant, United States, admits allegations in Paragraph 11 of the Cross-Complaint of the Development Company and states that said withholding tax remains wholly unpaid.

WHEREFORE, the defendant, United States of America, prays that in event of foreclosure and sale the proceeds of the sale be impounded in the registry of the Court pending proper determination of the ownership of the proceeds thereof.

UNITED STATES OF AMERICA,  
CHAS. W. ATKINSON  
*United States Attorney*

By /s/ ROBERT E. JOHNSON  
Robert E. Johnson  
*Assistant U. S. Attorney*

96

CERTIFICATE OF SERVICE  
(omitted in printing)

97

IN THE CHANCERY COURT OF SEBASTIAN COUNTY,  
ARKANSAS, FORT SMITH DISTRICT

(Title Omitted)

**Answer of Ocie A. Rogers and Florene W. Rogers—  
Filed July 12, 1961**

Comes Ocie A. Rogers and Florene W. Rogers and for their answer to all the pleadings in this matter directed

toward them, and with the intent to answer each and every material allegation contained in each and every pleading directed toward them, state and allege:

I

They deny each and every material allegation contained in each and every pleading directed toward them as specifically as if said denials were set out herein word for word.

WHEREFORE, premises considered, Ocie A. Rogers and Florene W. Rogers prays that each and every pleading directed toward them be dismissed and that each of said pleaders take nothing and that these defendants recover their costs expended herein, together with such other relief, both equitable and proper, to which they may be entitled.

/s/ CHAS. R. GARNER

Charles R. Garner

*Attorney for Ocie A. Rogers  
and Florence W. Rogers*

98

**CERTIFICATE OF SERVICE**  
(omitted in printing)

105

IN THE CHANCERY COURT OF SEBASTIAN COUNTY,  
ARKANSAS, PORT SMITH DISTRICT

(Title Omitted)

**Pre-Trial Order—September 7, 1961**

On this the 7th day of September, 1961, a pre-trial conference was held in Chambers, the plaintiffs and the defendant The Development Company, Inc. appearing by their attorneys, Bethell & Pearce, and the defendants Ocie A. Rogers and Florene Rogers by their attorney, Charles R. Garner, the defendant James F. Taylor pro se, the defendant Anderson Plumbing & Heating Company by its attorney, Franklin Wilder, the defendant Galen F. Schlund d/b/a Arkansas School of Cosmetology, by his attorney, Ed Bedwell, the defendant United States of America by

Robert Johnson, Assistant United States Attorney, the defendant Art Lundren, by his attorney, Finis F. Batchelor, Jr. The defendants Lee Davis and Jeff Davis, partners, d/b/a J. S. Davis & Sons Lumber Company, First Bancredit Corporation appear not, either in person or by attorney, although duly served with process in the manner and form required by law, and are hereby adjudged in default.

The suit is for foreclosure of a first and second mortgage and the question is priority of claims and liens.

The United States of America claims \$1,608.62 plus interest for withholding taxes for the period ending June 30, 1960; also, lien for period ending September 30, 1960. The lien was filed January 30, 1961. The Government admits that these liens are subordinate to the first and second mortgages, but claim it is not subordinate to advances or attorney fees, and agree to submit brief on this question within ten (10) days from the date of this order; plaintiffs and defendants have five (5) days for reply.

Alfred J. Anderson filed his lien March 18, 1960, claiming a balance due of \$206.00 for lien period January 1, 1959 to March 19, 1960. It was agreed and stipulated that this lien is subordinate to first and second mortgages.

Art Lundren filed his lien May 2, 1961 claiming \$5,688.18 for lien period March 28, 1958 to April 3, 1961. This lien is disputed by Ocie and Florene Rogers. It was stipulated and agreed that it was subordinate and inferior to the first and second mortgages.

It was stipulated between plaintiffs and defendants Ocie A. Rogers and Florene Rogers that the first and second mortgages were duly executed by them, and the dates and amounts set out therein are not denied. They admit the lien of Anderson Plumbing & Heating Company, but deny the claim in toto of Art Lundren.

On July 24th, 1959, the plaintiff filed a motion to strike the answer of Ocie A. and Florence Rogers. This motion was withdrawn in open Court by plaintiffs and defendant The Development Company, Inc.

Defendant Galen F. Schlund, lessee, claims no interest in the property. He has sub-let the premises to Idell Jones, who pays rent to the receiver.

This cause is to be set for trial on the merits by agreement of the parties.

/s/ HUGH M. BLAND  
Chancellor

(Recorded in Chancery Court Record Vol. 26 at page 436.)

110 IN THE CHANCERY COURT OF SEBASTIAN COUNTY,  
ARKANSAS, FORT SMITH DISTRICT

(Title Omitted)

**Amendment to Answer—Filed November 9, 1961**

Comes now the United States of America and for its Amendment to its Answer heretofore filed states:

1. It adopts the Answer as filed including all the allegations thereto.

2. Since the filing of this lawsuit, the District Director has filed the following liens:

a. On April 16, 1961, Federal Tax Lien in the principal sum of \$1288.96 upon which there is due through November 9, 1961, the sum of \$1344.69.

b. On July 17, 1961, tax lien for unpaid withheld tax was filed in the principal sum of \$1606.87 upon which there is now due the sum of \$1653.23.

c. On October 3, 1961, tax lien for unpaid withheld tax in the sum of \$1148.69 upon which there is now due \$1164.04.

3. The defendants, Ocie A. Rogers and Florene W. Rogers, have unpaid tax liens totaling \$6,482.66 as of this date.

111 WHEREFORE, defendant, United States, prays as in the original Answer.

UNITED STATES OF AMERICA  
CHAS. W. ATKINSON  
*United States Attorney*

By /s/ ROBERT E. JOHNSON  
Robert E. Johnson  
*Assistant U. S. Attorney*

(File Endorsement Omitted)

CERTIFICATE OF DELIVERY  
(omitted in printing)

112 IN THE CHANCERY COURT OF SEBASTIAN COUNTY,  
ARKANSAS, FORT SMITH DISTRICT

No. 570

PIONEER AMERICAN INSURANCE COMPANY AND GEORGE F.  
CARPENTER, Trustee for PIONEER AMERICAN INSURANCE  
COMPANY, *Plaintiffs*

v.

THE DEVELOPMENT COMPANY, INC., A CORPORATION, CECIL  
LAUGHLIN, JAMES F. TAYLOR, OCIE A. ROGERS AND  
FLORENE W. ROGERS, HUSBAND AND WIFE, LEE DAVIS  
AND JEFF DAVIS, PARTNERS DOING BUSINESS AS J. S.  
DAVIS & SONS LUMBER COMPANY, FIRST BANCREDIT COR-  
PORATION, A CORPORATION, ALFRED J. ANDERSON DOING  
BUSINESS AS ANDERSON PLUMBING & HEATING COMPANY,  
UNITED STATES OF AMERICA, GALEN F. SCHLUND, ART  
LUNDREN, ARKANSAS SCHOOL OF COSMETOLOGY, INC.,  
*Defendants*

THE DEVELOPMENT COMPANY, INC., A CORPORATION, ALFRED  
J. ANDERSON DOING BUSINESS AS ANDERSON PLUMBING  
& HEATING COMPANY, UNITED STATES OF AMERICA, AND  
ART LUNDREN, *Cross-Complainants*

**Decree—November 9, 1961**

On this 9th day of November, 1961, this cause came on for hearing upon the complaint, as amended, of the plain-



tiffs; the answer and cross-complaint of The Development Company, Inc.; the answer and cross-complaint of Alfred J. Anderson; the answers and cross-complaints of United States of America; the answer and cross-complaint, and response of Art Lundren; the answer of James F. Taylor; the answer of Ocie A. Rogers and Florene W. Rogers, husband and wife; the answer of Galen F. Schlund; and the report of Verdon Bennett, Receiver heretofore appointed

by the Court. The following defendants appeared  
113 not, but wholly made default: Cecil Laughlin; Lee Davis and Jeff Davis, partners doing business as J. S. Davis & Sons Lumber Company; First Bancredit Corporation; and Arkansas School of Cosmetology, Inc.

Appearance at the hearing were as follows: Plaintiffs by their attorneys, Bethell & Pearce and Donald P. Callaway; defendant and cross-complainant, The Development Company, Inc., by its duly authorized officers and its attorneys, Bethell & Pearce and Donald P. Callaway; defendant James F. Taylor pro se; defendants Ocie A. Rogers and Florene W. Rogers in person and by their attorney, Charles R. Garner; defendant and cross-complainant Alfred J. Anderson in person and by his attorney, Franklin Wilder; defendant and cross-complainant United States of America by Robert E. Johnson, Assistant United States Attorney; defendant Galen F. Schlund in person and by his attorney, Edward E. Bedwell; defendant and cross-complainant Art Lundren in person and by his attorney, Fines Batchelor, Jr.

The Court finds that the following defendants have been duly served in person with process for the time and in the form and manner required by law: The Development Company, Inc.; James F. Taylor; Ocie A. Rogers and Florene W. Rogers; Lee Davis and Jeff Davis, Partners doing business as J. S. Davis & Sons Lumber Company; Alfred J. Anderson; United States of America; Galen F. Schlund; Art Lundren; and Arkansas School of Cosmetology, Inc. The Court finds that the following defendants

have been duly served constructively (by publica-  
114 tion) for the time and in the form and manner required by law, report of the attorney ad litem having been in each case duly filed: Cecil Laughlin; First Bancredit Corporation.

The cause was heard upon the pleadings before the Court and the evidence and exhibits produced in open Court, from all of which the Court finds as follows:

1. The Court has jurisdiction of the parties and the subject matter of this cause.

2.a. On May 24, 1956, the defendants, The Development Company, Inc., a corporation, Cecil Laughlin and James F. Taylor, became indebted to Republic Mortgage Company, Inc. a corporation, in the amount of \$20,000.00, evidenced by their promissory note for that amount, with interest at the rate of six per cent per annum, payable in equal monthly installments of principal and interest in the amount of \$168.78, beginning July 1, 1956, and a like sum upon the first day of each month thereafter until said interest and principal shall have been paid in full.

b. To secure the payment of said note the defendant, The Development Company, Inc., executed and delivered to George F. Carpenter, Trustee for Republic Mortgage Company, Inc., its deed of trust dated May 24, 1956, wherein it conveyed to George F. Carpenter, as Trustee for Republic Mortgage Company, Inc., the following real property situated in the City of Fort Smith, Sebastian County, Arkansas, to-wit:

115      Lots 5 and 6 in Block 83 of Fitzgerald Addition to the City of Fort Smith, Sebastian County, Arkansas.

c. Said deed of trust was duly acknowledged, and was on June 7, 1956, filed for record in the office of the Recorder for the Fort Smith District of Sebastian County, Arkansas, and now appears of record in Book 186 at page 490.

d. In said deed of trust the defendant, The Development Company, Inc., waived any and all rights of redemption and/or appraisalment under the Laws of the State of Arkansas.

e. Under the terms of said note and deed of trust, the said defendant, The Development Company, Inc., Cecil Laughlin and James F. Taylor agreed to make monthly payments of principal and interest in the amount of \$168.78, and in addition thereto agreed to pay monthly one-twelfth of the annual taxes and special assessments and one/thirty-

sixth of the 3-year hazard insurance premium, subject to such adjustments as might be necessary to meet the payments as they fell due.

f. Under the terms of said deed of trust it is provided that if the grantor fails to pay interest on said note when due, or fails to make payments on principal, hazard insurance, taxes or special assessments when due, then at the option of the grantee, all of the indebtedness secured by said deed of trust shall become due for all purposes and the Trustee may proceed to sell the property, or to foreclose the said deed of trust in any court of competent jurisdiction.

116 g. On July 27, 1956, Republic Mortgage Company, Inc. endorsed said note and assigned said deed of trust for value received to plaintiff, Pioneer American Insurance Company, Fort Worth, Texas, the assignment having been duly acknowledged and filed for record in the office of the recorder for the Fort Smith District of Sebastian County, Arkansas, on August 7, 1956, where it now appears of record in Book 190 at page 10.

h. On March 4, 1958, the defendant, The Development Company, Inc., executed, acknowledged and delivered to defendants, Ocie A. Rogers and Florene W. Rogers, husband and wife, its corporation deed to the real property described above, which deed was filed for record in the office of the Recorder for the Fort Smith District of Sebastian County, Arkansas, on March 18, 1958, where it now appears of record in Book 158 at page 255. Said deed provides that it is given subject to the deed of trust held by the plaintiffs, hereinabove described, and the grantees assumed and agreed to pay the unpaid balance due thereunder.

i. Defendants, The Development Company, Inc., Cecil Laughlin, James F. Taylor, Ocie A. Rogers and Florene W. Rogers, have failed to make any payments on the promissory note and deed of trust of the plaintiffs for the months of October, 1960, and thereafter, although demand has been made for such payments, and the said defendants are now in default for same. Plaintiff has elected to de-

clare the entire unpaid balance of said note due and  
 117 payable. The principal amount thereof is \$15,926.98; advancements by plaintiff for hazard insurance premiums and general taxes on the real property hereinabove described, net of all amounts in the escrow account carried by plaintiff in connection with this loan, amount to \$430.66; interest on the principal to the date of hearing amounts to \$1,059.15; and interest on the advancements to the date of hearing amounts to \$23.08; making a total due plaintiff from said defendants of \$17,439.87. Plaintiff's right to have foreclosure of the deed of trust has become absolute, and plaintiff is entitled to judgment against said defendants for such amount of \$17,439.87.

j. Plaintiff, George F. Carpenter, is merely the holder of the maked legal title to the property aforesaid for the purposes hereinbefore stated, and he has never had and does not now have any interest therein or in the obligation sued on, except as Trustee for Pioneer American Insurance Company.

3.a. On March 4, 1958, the defendants, Ocie A. Rogers and Florene W. Rogers, became indebted to the Development Company, Inc., in the amount of \$2,500.00, evidenced by their promissory note for that amount, with interest at the rate of 5% per annum, payable at the rate of \$50.00 per month beginning March 1, 1958.

b. To secure the payment of said note, defendants, Rogers, on March 4, 1958, executed, acknowledged and delivered to The Development Company, Inc. their mortgage on the real property above described, which mortgage was filed for record in the office of the Recorder  
 118 for the Fort Smith District of Sebastian County, Arkansas, on March 18, 1958, where it now appears of record in Book 196 at page 164.

c. In said mortgage the defendants, Ocie A. Rogers and Florene W. Rogers, waived any and all rights of redemption and/or appraisal under the laws of the State of Arkansas.

d. Under the terms of said note and mortgage, defendants, Rogers, agreed to make monthly payments of principal and interest in the amount of \$50.00 per month beginning

March 4, 1958. It is provided in such mortgage that if the makers of such note shall fail to pay the indebtedness secured at the time and in the manner provided, the mortgagee or its assigns shall have the right and power to foreclose the lien of said mortgage.

e. Defendants, Rogers, made payments on said note sufficient to reduce the principal due thereon to \$1,846.50, but said defendants have failed and neglected to make payments of installments due August 4, 1959, and thereafter, although demand therefor has been made, and said defendants are now in default since at least August 4, 1959. The amount of the unpaid principal balance on said note is \$1,846.50, and interest thereon to the date of hearing is \$210.20, making a total of \$2,056.70 for which cross-complainant, The Development Company, Inc., is entitled to judgment against defendants, Ocie A. Rogers and Florence W. Rogers. Said cross-complainant's right to have foreclosure of said mortgage has become absolute.

119 4.2 During the period from January 23, 1959, to March 19, 1960, cross-complainant, Alfred J. Anderson, performed work for defendants, Rogers, on the real property described above in the total amount of \$446.35. To secure such sum, cross-complainant, Anderson, on April 18, 1960, filed a labor lien in the office of the Circuit Clerk of the Fort Smith District of Sebastian County, Arkansas.

b. Since the filing of such lien, defendants, Rogers, have paid thereon a total of \$240.00 and as of the date of hearing, the balance due on the account secured by such lien is \$206.35, which defendants, Rogers, have failed and neglected to pay, despite repeated demands by cross-complainant, Anderson. Said cross-complainant is entitled to judgment against defendants, Rogers, in such amount of \$206.35, and to foreclosure of said cross-complainant's labor lien.

5. Defendant, Art Lundren, in his answer and cross-complaint claims to have furnished labor and material to defendants, Rogers, in the amount of \$5,688.18, which were incorporated in improvements of or repairs to the real property described above, over a period from March 29,



1958, to April 3, 1961. Cross-complainant, Lundren, on May 2, 1961, filed with the Circuit Clerk of the Fort Smith District of Sebastian County, Arkansas, a mechanic and materialman's lien purporting to set forth his account, and his answer and cross-complaint prays for judgment and foreclosure of his claimed lien. Cross-complainant,

Lundren's, account and claimed lien were denied by defendants, Rogers, and by cross-complainant,

120 Alfred J. Anderson. The Court finds that cross-complainant, Lundren, has failed to prove his account in the amount of \$5,688.18 or in any other amount, and further has failed to prove that he furnished labor or materials which were incorporated in the real property described above on dates and in amounts which entitle him to a material or labor lien against such property. The cross-complaint of defendant, Lundren, should therefore be dismissed, but without prejudice to the right of cross-complainant, Lundren, to file a separate proceeding against defendants, Rogers, for the purpose of obtaining an accounting of the transactions between them.

6. The United States of America is entitled to a lien against the real property described above, as a result of Notices of Federal Tax Lien filed with the Circuit Clerk of the Fort Smith District of Sebastian County, Arkansas. The dates of such Notices, amounts thereof, interest to the date of hearing, and lien fees included in the lien of the United States of America are as follows:

Date of Filing	Taxes	Interest to November 9, 1961	Lien Fees	Total
November 29, 1960	\$ 559.52	\$98.15	\$2.00	\$ 659.67
January 30, 1961	1567.14	92.89	1.00	1,661.03
April 14, 1961	1288.96	54.73	1.00	1,344.69
July 17, 1961	1606.87	45.36	1.00	1,653.23
October 3, 1961	1148.69	14.35	1.00	1,164.04
TOTAL AMOUNT OF LIEN OF UNITED STATES OF AMERICA				\$6,482.66

7. Defendants, Lee Davis and Jeff Davis, partners doing business as J. S. Davis & Sons Lumber Company; First Bancredit Corporation; Galen F. Schlund; and  
121 Arkansas School of Cosmetology Inc. have no right, title, interest, lien, equity or estate in the real property described above, if any they have, same is subordinate



to the liens heretofore found to exist in favor of plaintiff and cross-complainants.

8.a. The lien of plaintiff, Pioneer American Insurance Company is a first, prior and paramount lien on the property described as:

Lots 5 and 6 in Block 83 of Fitzgerald Addition to the City of Fort Smith, Sebastian County, Arkansas,

prior and paramount to the right, title, lien, claim or interest of the defendants and each of them.

b. The second lien in order of priority is that of cross-complainant, The Development Company, Inc.

c. The third lien in order of priority is that of Alfred J. Anderson.

d. The fourth lien in order of priority is that of United States of America.

e. The United States of America has in open court conceded that its lien is subordinate to the lien of plaintiff, Pioneer American Insurance Company, insofar as principal and interest of said plaintiff's note are concerned, and to the lien of The Development Company, Inc. and Alfred J. Anderson. The United States of America claims, however, that its lien is prior to the lien of plaintiff, Pioneer American Insurance Company, so far as same secures advances for taxes and insurance premiums and attorney's fee (hereinafter fixed by the Court). The Court finds that under the Arkansas law plaintiff, Pioneer American Insurance Company, is entitled, as against The Development Company, Inc. and Alfred J. Anderson, to a first

122 lien to secure not only principal and interest of the main obligation, but also advancements for taxes and insurance premiums and attorney's fees fixed by the Court. The lien of United States of America is therefore found to be subordinate to the lien of plaintiff, Pioneer American Insurance Company, (for all amounts it secures, including principal of the note and interest thereon; advances for payment of taxes and insurance premiums, and interest thereon; and attorney's fees fixed by the Court); and subordinate also to the liens of The Development Company, Inc. and Alfred J. Anderson.

9: On the hearing date, Verdon Bennett, the Receiver heretofore appointed by the Court herein, filed his report which reflects that since he was appointed Receiver on May 9, 1961, he has collected rentals on the real property described above in the total amount of \$1,775.00, which sum is now on deposit in the Receiver's account. At the hearing the Court inquired whether there were any exceptions to the Receiver's report, and no exceptions were made known. The Court finds the fair value of the services rendered by the Receiver to be \$175.00 and fixes his compensation as Receiver at such amount of \$175.00. The Receiver should disburse such compensation to himself individually, and deposit all remaining funds in his hands, together with any amounts collected in the future, in the Registry of the Court, to be applied against costs herein and judgments rendered herein in the same manner as sale proceeds, and as hereinafter indicated.

123 10. The note held by plaintiff, Pioneer American Insurance Company provides for an attorney's fee in event of foreclosure proceedings. The Court finds the reasonable value of the services of plaintiff's attorneys herein to be \$1,250.00, and fixes their fee in such amount of \$1,250.00, the same to be a part of the total amount secured by plaintiff's first lien.

The Court being well and sufficiently advised in the premises, it is, therefore

CONSIDERED, ADJUDGED AND DECREED that Pioneer American Insurance Company do have and recover of and from defendants, Ocie A. Rogers, Florene W. Rogers, The Development Company, Inc., and James F. Taylor, personally, and against Cecil Laughlin, in rem, jointly and severally, the sum of \$18,689.87, with interest thereon at the rate of six per cent (6%) per annum from the date of hearing (November 9, 1961) until paid; that plaintiff, Pioneer American Insurance Company, has a valid first lien upon the lands and property in Sebastian County, Arkansas, described as:

Lots 5 and 6 in Block 83 of Fitzgerald Addition to the City of Fort Smith, Sebastian County, Arkansas,

to secure the payment of this judgment, which lien is superior and paramount to any right, title, claim, interest, equity or estate of the defendants, or anyone claiming by, through or under them; it is further

CONSIDERED, ADJUDGED AND DECREED that defendant and cross-complainant, The Development Company, Inc., have and recover of and from defendants, Ocie A. Rogers and Florene W. Rogers, jointly and severally, the sum of 124 \$2,056.70, with interest thereon at the rate of six per cent (6%) per annum from the date of hearing until paid; that cross-complainant, The Development Company, Inc., has a valid and subsisting second lien upon the property described above to secure payment of this judgment, which lien is subordinate and inferior only to the first lien of plaintiff, Pioneer American Insurance Company, and is prior and superior to the lien of each and every of the other defendants; it is further

CONSIDERED, ADJUDGED AND DECREED that defendant and cross-complainant, Alfred J. Anderson, have and recover of and from defendants Ocie A. Rogers and Florene W. Rogers, jointly and severally, the sum of \$206.35, with interest from the date of hearing until paid at the rate of six per cent (6%) per annum; that cross-complainant, Anderson, has a valid and subsisting third lien upon the property described above to secure payment of this judgment, which lien is subordinate and inferior only to the first and second liens herein, and is prior and superior to the lien of each and every of the other defendants; it is further

CONSIDERED, ADJUDGED AND DECREED that cross-complainant, United States of America, by virtue of its notices of Federal Tax Lien heretofore filed, have and recover of and from defendants, Ocie A. Rogers and Florene W. Rogers, the sum of \$6,482.66, with interest on taxes and lien fees (\$6,177.18) from the date of hearing until paid at the rate of six per cent (6%) per annum; that cross-complainant, United States of America, has a valid and subsisting fourth lien upon the property described above to secure payment of such amount, which lien is 125 subordinate and inferior only to the first, second and third liens herein, and is prior and superior to the

lien or other claim of each and every of the other defendants; it is further

CONSIDERED, ADJUDGED AND DECREED that the cross-complaint of Art Lundren be and it is hereby dismissed for want of equity; it is further

CONSIDERED, ADJUDGED AND DECREED that Verdon Bennett, the Receiver heretofore appointed by the Court, be and he hereby is allowed a fee for his services as Receiver in the amount of \$175.00; that he shall disburse the same to himself individually, and deposit all other sums on hand, together with any future collections, in the Registry of the Court, which sums shall be applied to the costs herein and to payment of judgments and liens in the order and as hereinafter indicated; it is further

CONSIDERED, ADJUDGED AND DECREED that the attorneys for plaintiff, Pioneer American Insurance Company, be and they hereby are awarded a fee in the amount of \$1,250.00 for their services herein, which amount is a part of the judgment heretofore rendered in favor of said plaintiff; it is further

CONSIDERED, ADJUDGED AND DECREED that if the sums adjudged to be due, as well as interest thereon, be not paid within ten days from the date this decree is signed, together with the costs of this action (which are hereby adjudged against the defendants, Ocie A. Rogers, Florene W. Rogers, The Development Company, Inc., James F. Taylor, and Cecil Laughlin, jointly and severally), that the Commissioner of this Court, hereinafter named, shall, after advertising the time, terms and place of sale  
 126 for a period of 20 days by publication of a notice thereof in some newspaper published in Sebastian County, Arkansas, and having a bona fide circulation therein, by three insertions, once each week; the last of which shall be not less than five days before the date of sale, sell at the front door of the Sebastian County Courthouse in Fort Smith, Arkansas, at public outcry to the highest bidder, on a credit of three months, the lands and property hereinabove described. The purchaser at such sale shall be required to give bond with surety thereon to be approved by the Commissioner making the sale, and

a lien on said property shall be retained to secure payment of the bond given for the purchase money bid at such sale; provided, that if plaintiff, Pioneer American Insurance Company shall become the purchaser at such sale for a sum equal to or less than the amount adjudged to be due it herein, in lieu of giving bond as required herein, it may credit the amount of its bid, less the costs of this action, and the fee to be allowed the Commissioner for executing this decree, upon the decree at the time of confirmation of such sale, which credit shall be an extinguishment of this judgment to the extent of such credit; and provided further that if its bid shall exceed the amount of its judgment and costs, it shall be required to give bond only for the excess; that if a subordinate lienor shall become the purchaser at such sale, said subordinate lienor shall be required to execute bond for no more than the amount of the judgment and interest in favor of lienors prior to him, and the costs of this action, and for such additional amount as the bid of such subordinate lienor may exceed the amount of his judgment; it is further

127 CONSIDERED, ADJUDGED AND DECREED that the proceeds of sale and all funds in the registry of the Court applicable to this proceeding, including funds there deposited by the Receiver, be applied in the following order:

1. To pay costs herein, including the fee to be allowed the Commissioner for executing this decree.
2. The judgment in favor of plaintiff, Pioneer American Insurance Company, and interest thereon.
3. The judgment in favor of cross-complainant, The Development Company, Inc., and interest thereon.
4. The judgment in favor of Alfred J. Anderson, and interest thereon.
5. The amount due the United States of America by virtue of the filing of its Notices of Federal Tax due, with interest thereon.
6. Surplus, if any, shall be paid to defendants, Ocie A. Rogers and Florene W. Rogers.



It is further

CONSIDERED, ADJUDGED AND DECREED that upon a sale of said lands and property as aforesaid, and confirmation thereof by this Court, all of the right, title, claim, interest, estate, equity or right of redemption of the defendants, or any of them, in and to said property, and every part thereof, shall be, and the same is hereby decreed to be forever barred and foreclosed, including all right or possibility of dower and/or homestead of Florene W. Rogers.

After confirmation of said sale, and after execution  
128 and delivery of the Commissioner's Deed, this Court's writ of assistance shall issue to the Sheriff of Sebastian County, Arkansas, directing him to place said property in the custody of the purchaser at such sale; it is further

CONSIDERED, ORDERED, ADJUDGED AND DECREED that Otis O. Harris, Jr., be, and he hereby is appointed Commissioner of this Court to execute this decree, and to make the sale aforesaid and report his actions hereunder to this Court.

To the findings and orders of the Court Cross-complainants, Art Lundren and United States of America except and ask that their exceptions be noted of record, which is hereby done.

The Court doth retain control of this cause for such further orders and judgments as may be necessary to enforce and protect the rights of the parties hereto as herein adjudged, and the rights of such persons as may hereafter become parties to this action by proper proceedings.

/s/ HUGH M. BLAND  
Chancellor

Date signed: November 15th, 1961.

As to defendant James F. Taylor only, the lien of the within judgment in favor of plaintiff Pioneer American Insurance Company is hereby released only as to Lot 90 (Ninety)



Eastern Hills Addition to the City of Fort Smith, Sebastian County, Arkansas, this 29th day of November, 1961.

BETHELL & PEARCE  
By /s/ OWEN C. PEARCE  
*Attorneys for Plaintiff Pioneer  
American Insurance Company*

Attest:

OTIS O. HARRIS, JR.

By DOROTHY NIGH, D.C.

129 IN THE CHANCERY COURT OF SEBASTIAN COUNTY,  
ARKANSAS, FORT SMITH DISTRICT

(Title omitted)

**Notice of Appeal by United States—Filed December 11, 1961**

Notice is hereby given that United States of America, defendant and cross-complainant above named, hereby appeals to the Supreme Court of the State of Arkansas from the Judgment entered November 10, 1961.

CHARLES W. ATKINSON  
*United States Attorney*

By /s/ ROBERT E. JOHNSON  
Robert E. Johnson  
*Assistant U. S. Attorney*

CERTIFICATE OF SERVICE  
(Omitted in printing)

130

(File endorsement omitted)

135 IN THE CHANCERY COURT OF SEBASTIAN COUNTY,  
ARKANSAS, FORT SMITH DISTRICT  
TO THE SEPTEMBER TERM THEREOF, 1961

(Title omitted)

**Report of Sale—Filed December 21, 1961**

To THE HON. HUGH M. BLAND, Chancellor:

The subscriber respectfully reports, that in pursuance of the authority and directions contained in the decretal

order of his Honorable Court, made and rendered in the above entitled cause on the 15th day of November, 1961, he gave notice of the time, place and terms for the sale of the land and premises therein described, to-wit:

Lots Five (5) and Six (6) in Block Eighty-three (83) of Fitzgerald Addition to the City of Fort Smith, Sebastian County, Arkansas,

by publication in the manner and for the time prescribed by law and said decree, and on the day fixed for the sale, viz; the 21st day of December, 1961, he did offer said land and premises for sale to the highest bidder, on a credit of three months, at the west door of the County Court House in the City of Fort Smith, the place designated by said decree for the sale thereof, and named in the notice (a

copy of which is hereto annexed), and at such sale  
136 so made and had by him Graham W. and Helen Idell Jones bid and offered the sum of Twenty-three Thousand Six Hundred and no/100 Dollars for said land and premises, and that being the highest bid, the same was struck of and sold to them for that sum: Twenty-three Thousand Six Hundred and no/100 (\$23,600.00).

And the said subscriber respectfully asks that he be allowed the sum of \$35.00 for his services as Commissioner herein.

All of which is respectfully submitted.

/s/ OTIS O. HARRIS, JR.

(SEAL)

*Commissioner in Chancery*

(File endoresment omitted)

139 IN THE CHANCERY COURT OF SEBASTIAN COUNTY,  
ARKANSAS, FORT SMITH DISTRICT

(Title omitted)

**Confirmation and Approval of Report of Sale—January 16, 1962**

On this 16th day of Jan., 1962, comes on for examination and approval the Report of Sale of Otis O. Harris, Jr., the commissioner heretofore appointed by the Court to execute

the decree rendered in this case, and said report being in words and figures as follows, to-wit:

"TO THE HONORABLE HUGH M. BLAND, CHANCELLOR:

"The subscriber respectfully reports that in pursuance of the authority and directions contained in the decretal order of this honorable court made and rendered in the above entitled cause on the 15th day of November, 1961, that he gave the notice of the time, place and terms for the sale of the land and premises therein mentioned, described as follows, to-wit:

Lots Five (5) and Six (6) in Block Eighty-three (83) of Fitzgerald Addition to the City of Fort Smith, Sebastian County, Arkansas,

by publishing in the manner and for the time prescribed by law in said decree.

And, on the day fixed for the sale, viz, 21st day of Dec., 1961, he did offer said land and premises for sale to the highest bidder on a credit of three months at the west door of the Court House in the City of Fort Smith, Arkansas, the place designated by said decree for the sale thereof, and named in the notice (a copy of which is hereto annexed) and at such sale so made and had by him Graham W. Jones and Helen Idell Jones bid and offered the sum of \$23,600.00 for said premises, and that being the highest bid, the same was struck off and sold to the said Graham W. Jones & Helen Idell Jones for the sum of \$23,600.00. And the said subscriber respectfully asks that he be allowed the sum of \$35.00 for his services as commissioner herein, all of which is respectfully submitted."

And it appearing to the Court that the Report of Sale was filed herein more than three days prior to this date and that no exceptions have been filed, nor objections urged thereto, and the Court being well and sufficiently advised in the premises does in all things approve said report and confirm said sale made aforesaid and the said commissioner is directed, upon the payment of the amount of said bid, he having elected to pay cash and waived credit, to execute the above named purchaser a good and sufficient deed to

the above described property and present the same to the court for approval.

/s/ HUGH M. BLAND  
Chancellor

(Entered of record in Chancery Court Record 27 at page 276)

149 IN THE CHANCERY COURT OF SEBASTIAN COUNTY,  
ARKANSAS

Fort Smith District

(Title omitted)

**Motion for Distribution of Funds—Filed January 17, 1962**

Comes the plaintiff, Pioneer American Insurance Company, and for its Motion for Distribution of Funds now in the hands of the Commissioner, shows the court as follows:

1. Foreclosure sale of Lots Five and Six in Block Eighty-three of Fitzgerald Addition to the City of Fort Smith, Sebastian County, Arkansas, has been completed, and, on January 3, 1962, Graham W. Jones and Helen Idell Jones, purchasers of said property at said foreclosure sale, paid over to the Commissioner the sum of Twenty-three Thousand Five Hundred Sixteen and 67/100 Dollars (\$23,561.67). A receivership fund in the amount of \$1,850.00 is also now in the hands of the Commissioner, said fund representing rental payments made on said property during pendency of this action.

2. Distribution of all sums now in the hands of the Commissioner should be made as follows:

\$257.55 for court costs, including a \$35.00 Commissioner's fee;

150 \$18,764.63 to Pioneer American Insurance Company, a corporation, which includes \$74.76 interest accrued since date of decree herein;

\$1,250.00 to Bethell & Pearce, representing attorney's fees allowed to Pioneer American Insurance Company;

\$2,064.93 to The Development Company, Inc., a corporation, which includes \$8.23 interest accrued since date of decree herein;

\$207.18 to Alfred J. Anderson d/b/a Anderson Plumbing & Heating Company, which includes eighty-three cents interest accrued since date of decree herein;

And remainder to United States of America.

WHEREFORE, movant prays that distribution of funds now in the hands of the Commissioner be made to all parties herein as set forth above.

PIONEER AMERICAN INSURANCE  
COMPANY and GEORGE F.  
CARPENTER, TRUSTEE FOR  
PIONEER AMERICAN INSUR-  
ANCE COMPANY, *Plaintiffs*

By: BETHELL & PEARCE  
*Attorneys for Plaintiffs*

By /s/ DONALD P. CALLAWAY

Certificate of Mailing—Omitted in Printing

(File endorsement omitted)

151

152 IN THE CHANCERY COURT OF SEBASTIAN COUNTY,  
ARKANSAS

Fort Smith District

(Title omitted)

Response to Motion for Distribution of Funds—  
Filed January 18, 1962

Comes now the defendant, United States of America, by and through its attorney for the Western District of Arkansas, and shows and makes known to the Court:

1. The defendant has filed Notice of Appeal and further filed Designation of Record herein for appeal of the decision of this case concerning priority to the Supreme Court of the State of Arkansas.

2. The defendant, United States, has no objection to distribution of a part of the assets now in the hands of the Commissioner as long as the sum of \$2,750.00 is retained by him subject to final order after appeal is finally decided.

WHEREFORE, defendants, United States, prays that the sum of \$2,750.00 be retained in the registry of the Court and such other relief to which it might be entitled.

CHARLES M. CONWAY  
*United States Attorney*

By /s/ ROBERT E. JOHNSON  
Robert E. Johnson  
*Assistant U. S. Attorney*

153 Certificate of Service omitted in printing  
(File endorsement omitted)

154 IN THE CHANCERY COURT OF SEBASTIAN COUNTY,  
ARKANSAS

Fort Smith District  
(Title omitted)

Order—January 22, 1962

On the 22nd day of January, 1962, plaintiffs' motion for distribution of funds came on for hearing. Appearances at the hearing were as follows: Plaintiff, Pioneer American Insurance Company, and defendant, The Development Company, Inc., by their attorneys, Bethell & Pearce and Donald P. Callaway; defendant, Alfred J. Anderson, by his attorney, Franklin Wilder, Robert E. Johnson, Assistant U. S. Attorney, had previously advised the Court that he could not attend the hearing because of a conflict in court calendars, and had requested the Court not to make a ruling on whether the United States of America would be required to file a supersedeas bond, until he had opportunity to be heard on this point. He had further advised the Court to



the same effect as stated in the response of the United States of America, that the United States has no objection to distribution of a part of the assets now in the hands of the Commissioner, so long as the sum of \$2,750.00 is retained by the Commissioner pending disposition of  
 155 the appeal herein, or decision by this Court as to whether the United States will be required to file a supersedeas bond.

Although notice of such hearing was given for the time and in the form and manner required by law, no parties appeared, either in person or by attorneys, except as recited above.

It being the day regularly set for hearing plaintiffs' motion for distribution of funds, the same was heard upon such motion, the responses thereto by the United States of America, the contents of the file herein, and statements of counsel, from all of which the Court finds as follows:

1. If distribution is made presently to the first, second and third lienors (Pioneer American Insurance Company, The Development Company, Inc., and Alfred J. Anderson respectively), including attorneys' fees allowed by the Court, there will remain in the hands of the Commissioner a sum greater than the sum of \$2,750.00 which defendant United States of America has requested to be retained in the Registry of the Court.

2. There is therefore no reason why distribution should not be made to the first, second and third lienors.

IT IS THEREFORE ORDERED that Otis O. Harris, Jr., the Commissioner heretofore appointed by the Court, be and he is authorized and directed to distribute funds in  
 156 his hands to the first, second and third lienors (Pioneer American Insurance Company, The Development Company, Inc. and Alfred J. Anderson respectively), including Court costs and attorneys' fees heretofore fixed and awarded by the Court; that no less than \$2,750.00 be retained in the Registry of the Court; and that the question of whether defendant United States of America will be required to file a supersedeas bond herein to stay distribution of the funds remaining in the hands of the Commis-

sioner will be continued until defendant United States of America may be heard on such question.

Entered now for them.

Date: 1-22-62.

/s/ HUGH M. BLAND  
Chancellor

(Entered of record in Chancery Court Record 27 at page 312)

(File endorsement omitted)

160 IN THE CHANCERY COURT OF SEBASTIAN COUNTY,  
ARKANSAS, FORT SMITH DIVISION

No. 570

PIONEER AMERICAN INSURANCE COMPANY AND GEORGE F.  
CARPENTER, TRUSTEE FOR PIONEER AMERICAN INSURANCE  
COMPANY, *Plaintiffs*

v.

THE DEVELOPMENT COMPANY, INC., a corporation; CECIL  
LAUGHLIN; JAMES F. TAYLOR; OCIE A. ROGERS AND  
FLORENE W. ROGERS; LEE DAVIS AND JEFF DAVIS d/b/a  
J. S. DAVIS & SONS LUMBER COMPANY; FIRST BANCREDIT  
CORPORATION, ST. PAUL, MINNESOTA; ALFRED J. ANDER-  
SON d/b/a ANDERSON PLUMBING & HEATING COMPANY;  
AND UNITED STATES OF AMERICA, *Defendants*

**Bill of Exceptions—Filed March 1, 1962**

EVIDENCE ADDUCED BEFORE HON. HUGH M. BLAND  
CHANCELLOR TENTH CHANCERY CIRCUIT OF ARKANSAS

November 9, 1961

APPEARANCES:

For Plaintiffs:

BETHELL & PEARCE  
*Attorneys at Law*  
Professional Building  
Fort Smith, Arkansas

For Defendant, The  
Development Company, Inc:

BETHELL & PEARCE  
*Attorneys at Law*  
Professional Building  
Fort Smith, Arkansas.

For the Defendants Ocie A.  
Rogers & Florene W. Rogers:

MR. CHARLES R. GARNER  
*Attorney at Law*  
1322 North B Street  
Fort Smith, Arkansas

161 For the Defendant Alfred  
J. Anderson d/b/a Anderson  
Plumbing & Heating Company:

MR. FRANKLIN WILDER  
*Attorney at Law*  
Professional Building  
Fort Smith, Arkansas

For the Defendant United  
States of America:

MR. ROBERT E. JOHNSON  
*Assistant U. S. Attorney*  
Federal Building  
Fort Smith, Arkansas

For the Defendant Art Lundren:

MR. FINES F. BATCHELOR, JR.  
*Attorney at Law*  
Van Buren, Arkansas

#### 162 Colloquy Between Court and Counsel

Mr. Johnson: If the Court please, I would like to file an amended answer.

Mr. Pearce: We object to this. If the Government is permitted to file successive liens we never will get through with this lawsuit. Certainly as far as the plaintiff and

cross-complainant, Development Company, is concerned we certainly would want to question whether these liens are prior to anyone in this lawsuit.

The Court: I will let them be filed and determine that when we get to it as to whether or not they are valid liens. We have had a pre-trial conference on this and a pre-trial order was made in the case on the 7th of September, 1961. I suppose all of you have copies of that pre-trial order. Would you like to make short statements of the issues?

Mr. Pearce: Bethell & Pearce and Donald Calloway are appearing for plaintiff, Pioneer American Insurance Company and Cross-Complainant, The Development Company, Inc. Mr. Charles R. Garner for Ocie Rogers and Florene

Rogers; Mr. Robert L. Johnson, representing the 163 United States of America; Mr. Franklin Wilder, representing Alfred J. Anderson Plumbing Company; Mr. Fines F. Batchelor, representing Mr. Art Lundren--

The Court: That will be one of the claims that will be controverted?

Mr. Batchelor: Yes, sir.

The Court: The Receiver has filed his report showing that he collected rentals in the amount of \$1775.00 as of November 8, 1961, representing monthly rent for the month of November, 1961. Is there any question about that Receiver's report?

(No answer).

The Court: All right. Now all of those that know themselves to be parties and witnesses in this case, will they please come to the bar and hold up your right hand and be sworn.

(Witnesses are sworn by the Clerk).

The Court: Does anyone request the rule? The rule is not requested, so you all may remain in the courtroom.

Now, let me ask you, how do you want to proceed in 164 this matter? I believe everyone admits the execution of the note and mortgage, and that it is a first lien on the property, is that right?

Mr. Garner: Yes, sir.

Mr. Pearce: Yes, sir.

The Court: So at this time the Court without objection from all of the parties, will enter judgment for the plaintiff against all defendants foreclosing the mortgage and personal judgment in the amount of—

Mr. Pearce: We are going to have a witness to bring that up to date.

The Court: Maybe we had better wait then. Just wait then.

Mr. Garner: Isn't that a question of mathematics? If it is I would have no—6% of \$1000 is \$60.00 I understand.

Mr. Pearce: That will be fine. I think we can save some time probably. We would like to designate copies of the main documents—we have the originals here in the record at this time—as Plaintiff's Exhibit 1, if the

165 Court please, the note by the Development Company and others to Republic Mortgage Company, Inc. dated May 24, 1956, which has been negotiated by Republic Mortgage Company, Inc. to Pioneer American Insurance Company, and what we would like to do is introduce a copy which appears as Exhibit A to the complaint in the record.

Mr. Garner: Mr. Ocie Rogers, the defendant, has no objection.

The Court: Any objection to that at all? In other words, you want to introduce the original and substitute a photostatic copy attached to the complaint as Exhibit A?

Mr. Pearce: That is correct.

The Court: It will be admitted.

(Plaintiff's Exhibit #1 introduced in evidence)

168 Mr. Pearce: As Plaintiff's Exhibit B—Exhibit 2: rather—we desire to introduce the original and substitute the copy which is attached to the complaint as Exhibit B, of the Deed of Trust, made by the Development Company, Inc. to Republic Mortgage Company, Inc. dated May 24, 1956, and which appears of record in Mortgage Book 186 at page 490.

The Court: And substitute for that Exhibit B attached to the Complaint?

Mr. Pearce: Correct, Your Honor.

The Court: All right, that will be admitted.



Mr. Garner: Defendant Ocie Rogers has no objection.

Mr. Wilder: No objections.

(Plaintiff's Exhibit  $\#2$  introduced in evidence)

174 Mr. Pearce: As plaintiff's Exhibit  $\#3$  we desire to introduce the original and substitute the copy which is attached as Exhibit C to the complaint of the assignment by Republic Mortgage Company, Inc. to Pioneer American Insurance Company, and this assignment is dated the 27th of July, 1956, and appears of record in Book 190 at page 10.

The Court: It will be admitted without objection.

(Plaintiff's Exhibit  $\#3$  introduced in evidence)

177 Mr. Pearce: If I could go just a little bit out of order at this time, Your Honor, I would like to introduce the exhibits of the Cross-Complainant, The Development Company, which is the second mortgage.

The Court: All right.

Mr. Pearce: As Exhibit  $\#1$  of the Cross-Complainant, Development Company, Inc., we would like to offer the original note and substitute Exhibit A to the cross-complaint, which is a copy of this note. This note bears the date of March 4, 1958, in the amount of \$2500.00 and is made by Ocie O. A. Rogers and Florene W. Rogers in favor of the Development Company, inc.

The Court: Any objections? It will be admitted.

(Cross-Complainant's Exhibit  $\#1$  introduced in evidence)

179 Mr. Pearce: As Exhibit 2 of the Cross-Complainant The Development Company, Inc., we desire to offer the original mortgage and substitute for the original the copy thereof for which is attached as Exhibit B to the Cross-Complaint of The Development Company, Inc. This mortgage is made by Ocie A. Rogers and Florene W. Rogers in favor of the Development Company, Inc., dated the 4th day of March, 1958, and it appears of record in Book 158 at page 164.



The Court: Any objection?

Mr. Garner: No, sir.

The Court: It will be admitted.

(Cross-Complainant's Exhibit #2 introduced in evidence)

185 Mr. Pearce: As Exhibit C of the Cross-Complainant, The Development Company, Inc., we should like to introduce the recorded deed from the Development Company, Inc. to Ocie A. Rogers and Florene W. Rogers, which appears in Book 158 at page 255, dated March 4, 1958. Now, Mr. Harris is here. I had intended for him to read only the description and the assumptive clause by the Rogerses. If all parties are agreeable, we could waive the reading of those and let the deed be included in the record by reference to the book and page number.

The Court: Any objections?

Mr. Garner: No, sir.

The Court: All right, it will be admitted.

(Cross-Complainant's Exhibit #3 introduced in evidence)

### CHARLES KECK

188 Mr. Pearce: Then I should like to call in behalf of the plaintiff, Mr. Charles Keck. Mr. Keck, will you just give us the amount of the principal, the interest up to the present day, and the advances for taxes and insurance on the part of the Republic Mortgage?

Mr. Keck: The unpaid principal balance, \$15,926.98. Escrow advances for the payment of taxes and insurance, \$430.66.

Mr. Pearce: That is the net amount, is it?

Mr. Keck: That is the net amount of the advances.

Mr. Pearce: \$430.66?

Mr. Keck: That is right. Interest on the unpaid principal balance from October 1, 1960, to November 9, 1961; \$1,059.15, and interest on the advances at the same rate, \$23.08, total interest of \$1,082.23, to date.

Mr. Pearce: Do you have a total of the entire amount?

Mr. Keck: No, sir, but I can calculate it real quick.

Mr. Garner: Is that interest at the rate calculated allowed by the mortgage and the notes?

189 Mr. Keek: Yes, sir. I calculate the total to be \$17,009.21.

Mr. Pearce: I wonder if anyone else added these up. I didn't get that. Did you include the advances in there?

Mr. Keek: No, sir, that does not include the advances. That makes a total of \$17,439.87.

The Court: That is what I got.

Mr. Pearce: If those amounts can be stipulated to it will save some time.

The Court: Can you stipulate as to those amounts?

Mr. Johnson: I would like to note the dates of those advances—give the dates and amounts of the advances and the credits against the advances.

Mr. Keek: On February 13, 1961, Pioneer American advanced \$376.08; on March 9, 1961 they advanced \$236.82. Those advances were made to permit us to pay an insurance premium and 1960 state and county taxes. A rebate or returned insurance premium was received so that on July 3, we were able to return to Pioneer American Insurance Company \$229.36. That made the net total  
190 advance \$430.66, and interest was calculated, as I told you awhile ago on the actual periods that the— in other words, \$376.80 for 24 days on \$660.02 for 114 days, and \$430.66 for 126 days.

Mr. Johnson: That answers the question.

Mr. Pearce: Is that all stipulated to?

Mr. Garner: Yes, sir.

Mr. Johnson: Yes, sir.

Mr. Wilder: Yes, sir.

Mr. Batchelor: Yes, sir.

Mr. Pearce: I will ask Mr. Harrison, if he will, on the part of The Development Company, Inc. the amount of accrued interest. What is the amount your records show?

Mr. Harrison: The principal amount due \$1846.50. There is interest due computed at the rate of 5% for a period from August 1, 1959, through November 9, 1961—2 years, 101 days—totaling \$210.20.

Mr. Pearce: The total of those?

Mr. Harrison: \$2,056.07.

Mr. Pearce: If that can be stipulated to it will save some time. ♡

The Court: Is that stipulated, gentlemen?

191 Mr. Garner: Yes, sir.

Mr. Johnson: Yes, sir.

Mr. Wilder: Yes, sir.

Mr. Batchelor: Yes, sir.

Mr. Pearce: If the Court please, there are three other matters so far as the plaintiff and cross-complainant, Development Company, are concerned that perhaps should be taken up at another time. That is the matter of the attorney's fee, and a fee for the Receiver, and the point about the claimed priority of the Government lien. Those things we would like to reserve to go into at the proper time, whenever the Court would like to hear them.

The Court: All right.

Mr. Pearce: Therefore, the plaintiff rests, and also the cross-complainant Development Company, Inc.

The Court: All right. Is there any dispute at all about the claim of Alfred J. Anderson. In the pre-trial conference that was agreed upon.

192 Mr. Garner: That is true.

The Court: Mr. Wilder, will you give us the amount of the claim of the Alfred J. Anderson Plumbing Company?

Mr. Wilder: Yes, sir. Your Honor, there is a balance due on the lien of \$206.35. We would like to offer Defendant's Exhibit #1 and #2, which is the Notice and copy of the lien, please sir.

Mr. Garner: No objections.

The Court: It will be admitted.

(Defendant's Exhibit #1 and #2 introduced in evidence)

203 The Court: Now, that brings us down to the claim of Art Lundren.

Mr. Garner: We will admit, Your Honor, that they filed it. We will not admit that it is a proper or legal lien in any manner, and will not admit the dates. I will admit that the Clerk will testify that they did file a lien, an alleged lien.

The Court: All right.

Mr. Batchelor: And let it be introduced in evidence?

Mr. Garner: Yes, sir.

The Court: All right. Do you have the lien there?

Mr. Batchelor: The Clerk has and we would like withdraw the original lien and substitute the copy that is attached.

The Court: That will be marked Lundren's Exhibit #1. The Materialman's and Mechanics Lien is offered in evidence and permission granted to substitute a photostatic copy.

Mr. Batchelor: May we substitute the copy that is attached to the Answer?

The Court: Yes, and permitted to substitute copy of lien attached to the Answer.

204 Mr. Batchelor: We style it Separate Answer of Art Lundren and prayer for lien foreclosing judgment.

The Court: And permission is granted to substitute list of materials and labor attached to that Answer as Exhibit A.

The Court: All right.

(Lundren's Exhibit #1 introduced in evidence)

234 MR. JOHN REYNOLDS, being called to the witness stand on the part of the United States of America, after being duly sworn, testifies as follows:

#### Direct Examination

By Mr. Johnson:

Mr. Garner: Since we don't dispute that lien may we just be dismissed.

The Court: No, you just stick around awhile. I don't think anybody disputes this lien.

Mr. Johnson: All I am wanting to do is to bring to the Court's attention the amount due as of now on each lien, because I feel that the priority in each lien is different probably.

The Court: All right.

Q. Mr. Reynolds, you are with the Internal Revenue Service? A. Right.

Q. Do you have a computation of the amount due as of

today on each of the liens filed against Ocie and Florene Rogers? A. Yes, sir, I do.

Q. Now, the lien filed on November 29th, 1960, what is the total amount due as of this date on that lien? A. You would like to have the tax lien free and interest to date?

Q. The total to date.

235 A. Mr. Pearce: We would like to have it broken down.

A. The tax is \$559.52, interest \$98.15, lien fee \$2.00, a total of \$659.67.

Q. Now as to the lien filed January 30th, 1961? A. Tax on that is \$1,567.14, interest \$92.89, lien fee of \$1.00, a total of \$1,661.03.

Q. Now, the lien filed April 14th, 1961? A. That amount, the tax is \$1,288.96, interest of \$54.73, lien fee of \$1.00, total \$1,344.69.

Q. Now then the lien filed July 17th, 1961? A. That tax is \$1,606.87, interest \$45.36, lien fee of \$1.00, total of \$1,653.23.

Q. Now the lien filed October 3, 1961? A. Tax of \$1,048.69, interest \$14.35, lien fee of \$1.00, a total of \$1,164.04. That gives a total liability all tax, lien fees and interest of \$6,482.66.

Q. I believe it is stipulated that the liens have been filed as of the dates mentioned?

The Court: Yes, that was in the pre-trial. Any cross examination?

Mr. Pearce: Interest computed to when? A. To date.

#### Cross Examination

By Mr. Garner:

Q. Have you made some collections on this, Mr. Reynolds? A. I am not in a position to say. I do not know.

236 Q. You are not in a position to say whether or not that represents a true and correct amount owed to the United States by this defendant, are you? A. I am prepared to say that is what is owed to date. Whether there have been any payments made on the tax since the assessment, I cannot say, but that is the balance of tax, interest and lien fees as of today.

Q. Do you show any payments lately? A. I beg your pardon, there have been some payments. I have that

listed. I am sorry. I was not aware of that. I can give you those payments and the dates.

Q. In other words, there is not \$6,482.66 owing then? A. There is that much owing today.

Q. That is after the credits have been allowed? A. After the credits have been allowed.

Q. When were they allowed, please, sir. A. On your liability for the second quarter of 1960 there was a payment made November 8, 1960, of \$63.00; December, 12, 1960, \$69.28; on March 3, 1961, a payment of \$98.75. There was a credit, an overpayment, I believe, from 1960 income tax, which was credited to this account June 16, 1961, of \$1,049.10. There is a balance on that tax as was quoted in my original statement of \$559.51, 52 cents.

Q. To get down to specifics. Haven't you all garnisheed his wages at the railroad? A. I am not in a position to say.

I do not know.

237 Q. You don't know whether there has been any payments made the last month on that account, do you? A. If there have been any payments made they have not been credited to the account.

Q. Within the last month? A. So far as I know, there has not been a payment.

Q. Did you know the Government has garnisheed his wages at the railroad or whatever they do? I don't know what procedure the Government goes through, but they have tied up his wages. A. I am not aware of that, no, sir. That is entirely possible; very probably.

The Court: Let me get it clear then. All of these credits, Mr. Reynolds, you have mentioned, there is still a balance due of \$6,482.66? A. Correct, yes, sir.

The Court: If there is no other questions the witness is excused. Now what else is there?

(Witness excused)

#### 238 Colloquy Between Court and Counsel

Mr. Pearce: I have one matter. At this time, if the Court please, I would like for the Government to state its position with regard to their claim of priority. Now, I believe all parties are agreed at this time that on the basis of the evidence introduced up to this point, I believe all parties agree to the conception of it that under the



Arkansas law Pioneer American Insurance Company would be entitled to a first lien for the entire amount which was given here; which includes advances and interest, a total of \$17,439.87. That the second lien would be in favor of the Development Company for its total amount; and after that lien would come the lien of Anderson Plumbing Company. Now, I think the Government ought to state whether it intends to participate at all until all of those amounts are paid, including Anderson Plumbing Company. I am

239 interested specifically whether the Government claims that after the principal and interest on the first lien has been paid, which would amount to about \$17,000, if they are claiming that at that point they are entitled to come next and before the Development Company and Anderson Plumbing Company, or if they concede that Pioneer American can collect not only the principal and interest but also the advances, after which comes the Development Company, Anderson Plumbing Company, and then the Government.

The Court: Here is the way I have it down here. Pioneer American Insurance Company should have the first lien based on its recording date of June 7, 1956. The Development Company should have the second priority based on its recording of March 18, 1958. Anderson should have the third priority based on his recording April 18, 1960.

Mr. Wilder: Just one thing. I want to suggest to the Court. As I understand it, our lien would date from the date of the first material put on the job which, 240 according to the exhibit introduced here this morning, was January 27, 1959.

The Court: It is still second in priority. Now then the United States Government, what is your position. I have that they come next.

Mr. Johnson: Our position is that it is behind all recorded liens. However, as to the date of filing of the lien, it is ahead of any future advances including advances for attorney's fees as of the date of the filing of the complaint.

Mr. Pearce: I think this is where the Government should declare itself. Our position on this is this. We have got about \$400 in advances, and we assume the Court is going to allow us an attorney's fee. I think the Government ought to state whether it is claiming to come before those

advances which was put in front of the Development Company and Anderson in this particular case. This is not a case where we have got one lienor. I don't know  
 241 how the Government can get in front of the advances and the attorney's fees and behind the Development Company and Anderson. I don't think there is any way for them to do that. I think the Government ought to state definitely what position it takes on that because we have a very serious issue. If they are claiming to come in after a bid of say \$17,000.

Mr. Johnson: Our position is, if there is a sale of the foreclosure and it sells for less than the amount of principal and interest of the mortgage, the principal—

The Court: Two mortgages.

Mr. Johnson: Of the second mortgage and the plumbing bill, the Government has no interest whatsoever in the property. However, if it exceeds that, the Government has a first lien if it exceeds the principal and interest of the mortgages and the plumbing bill, then the Government comes in.

Mr. Pearce: Part of the first mortgage is going to be the attorney's fee and the advances. I don't think  
 242 still the position has been taken on this, and I think the Government ought to be required to state its position on it.

The Court: Now suppose I allow an attorney's fee in this case, which I am going to, and the expense of the Receiver. Isn't that a part of the first mortgage?

Mr. Pearce: That is our position, and especially so in a case like this where there is a second and third lien where those things come before the second and third liens. Now that is the point the Government should say if it is behind all of these things, including our attorney's fee and including advances and Receiver's fee, which I appreciate the Court's mentioning.

The Court: It occurs to me now that the incidental expenses of the foreclosure are included in the lien established by the foreclosure of the mortgage, and therefore the Government would come in after, as you say, they would come in after that but not be entitled to be ahead of any advances, or attorney's fees or Receiver's.

243 Mr. Johnson: It is our position that the liens are by federal law rather than by state law, and the

federal laws controls that in any advances made after the date of notice of our lien—

The Court: I wonder how binding that is on this court?

Mr. Johnson: I feel as though, it being federal law, it is binding on all courts.

Mr. Pearce: I think Mr. Johnson is stating his position. He wants us to take principal and interest, then the next thing he wants is his lien. In effect, he wants to get in front of the second and third lienors.

Mr. Johnson: No, you are putting words in my mouth.

Mr. Pearce: How could you get behind the second and third lienors—

The Court: He is not trying to get that, Mr. Pearce, as I understand it. He is saying that if the property brings enough to pay the principal and interest, attorney fees, advances and so on and so forth of the first and  
244 second mortgage and the plumbing bill, then the Government should come in, is that right?

Mr. Johnson: No, what I am saying is that the principal and interest and receiver's fee also is an expense incidental to the Court, but we come ahead if it brings more than principal and interest of both mortgages and the plumbing bill, then we are entitled to priority no matter who gets hurt.

The Court: You mean over and above the attorney's fee?

Mr. Pearce: But we are entitled to priority over the second and third lien as to our advances and attorney's fees. Therefore, he is trying to get the second lien, that is in effect what he is saying. I want to ask the Court for a ruling that Pioneer American Insurance Company has a lien not only for its principal and interest but also for the advances and for the attorney's fees, and I think the Receiver's fee would be an expense of the court which would come in before.

245 The Court: I have read those federal cases, now, in the Fourth Circuit. The Eighth Circuit has never passed on it. I read those cases. Now, they are based upon a federal statute. Now here we have got a basic state law that establishes these liens. How the federal government can come in here and say that they can do that.

I may get reversed, but I am not going to go along with that. I may be wrong. I am just not going to go along with that. So I don't think it is right. I am going to rule that the Pioneer, or the plaintiff in this case, and the Development Company has prior liens, principal, interest, attorney's fees, advances, and Receiver's fees, over and above the Government, and the Government's lien will not intercede, in any way, to be superior or ahead of those liens.

Mr. Johnson: Save our exceptions.

Mr. Pearce: We have two other things, if the Court please. The matter of the attorney's fees and the Receiver's fees.

246 The Court: How much attorney's fee are you entitled to?

Mr. Pearce: I think we are entitled to 10% of the principal and interest which totals—

The Court: Does the note and mortgage fix the attorney fee?

Mr. Pearce: The note reads as follows: "The undersigned agrees in default herein and the placing of this note for collection or this note is collected through any court proceedings to pay a reasonable attorney's fee. Every endorser hereof waives presentment of payment and notice" and so forth and so on. This is in the original note.

Mr. Garner: Now, Your Honor, I would like to say this on behalf of my client. I never fight a lawyer's fee, but I would think that 10% would be a little bit stiff.

Mr. Pearce: I would say that the law prevents the 10% fee, and would like to request the court for 10% of whatever the Court thinks is appropriate. I think the Court is familiar as anyone else with the various difficulties

247 we have had in this case with the number of defendants in this case, and we will encounter the drafting of the decree.

Mr. Garner: Let me say this. The difficulty in this case is not—the fee in this case is going to be allowed against Ocie Rogers. Ocie Rogers has not given them one bit of trouble. As a matter of fact, all we have done is come in and admitted every step of the way that the principal was

there, that the interest was there, and we know we owe you, and we admitted it all along. The difficulty in the work that Mr. Pearce has done has been incurred with the United States Government and the other lienors, or purported lienors.

Mr. Wilder: I understand that the statute does not say a flat 10%. It says up to 10%.

The Court: Yes. I think 10% would be excessive. I am going to allow an attorney fee of \$1250.00. Now the Receiver's fee. How much—

Mr. Pearce: The only suggestion we would have for the Court, if the Court please, on the Receiver's fee.

248 The Receiver has spent a great deal of time and effort on this matter. I think all parties are aware of that, in collecting these rents. I think the standard charge as a rental agent in Fort Smith is about 10%. So far as we are concerned, we think 10% fee would be the amount he is entitled to, and the amount that he has collected is \$1775.00.

The Court: Would there be any objection to paying \$175.00 Receiver's fee?

Mr. Garner: I am in no position to object to it. I don't know what work he has done, Your Honor. It has simply been a question of mailing in a check every month.

Mr. Pearce: Let me say this. He has had to call out there a number of times; he has had to write a number of letters, and I think he has handled some—

The Court: He has called me several times. I think it would be a reasonable fee. \$175.00. Now then we are ready for the judgment. All right, the decree of  
249 foreclosure of both the first and second mortgage, personal judgment in favor of the Pioneer American Insurance Company the sum of \$17,439.87. Personal judgment in favor of the Development Company under the second mortgage in the sum of \$2,056.70. Plaintiffs first and second mortgagors, Pioneer American Insurance Company will have a first lien. Leave that out for minute. Attorney's fee of \$1250.00 to plaintiff's attorneys, \$175.00 fixed as Receiver's fee. All of this to be a first lien on the property in favor of Pioneer American Insurance Co. And a second in favor of the Development Company. Next



in priority, Alfred J. Anderson in the sum of \$206.36, 35 cents; and a fourth lien in priority in favor of the United States of America for \$6,482.66. Everybody take exceptions to it.

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REPORTER'S CERTIFICATE

(Omitted in printing)

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IN THE CHANCERY COURT OF SEBASTIAN COUNTY,  
ARKANSAS, FORT SMITH DISTRICT

**Court's Order Approving Bill of Exceptions—March 1, 1962**

The foregoing typewritten matter is a true and correct transcription of the evidence adduced and the proceedings had before me at the time, place and in the cause mentioned in the caption page hereof.

IT IS, THEREFORE, in all things approved as the Bill of Exceptions in the case and is hereby ordered filed with the Clerk of the Court to be and become a part of the record on appeal to the Supreme Court of Arkansas.

SIGNED this 1st day of March, 1962:

HUGH M. BLAND

Hugh M. Bland, *Chancellor*

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(Clerk's Certificate to foregoing transcript  
omitted in printing)

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UNITED STATES OF AMERICA, *Appellant*

v.

PIONEER AMERICAN INSURANCE COMPANY, *Appellee*.Appeal from Sebastian Chancery Court  
Fort Smith District

AFFIRMED

Opinion—June 4, 1962

ED. F. McFADDIN, Associate Justice

This appeal challenges a decree which held that an attorney's fee in the mortgage foreclosure suit was superior to the federal/tax lien. Events and dates are as follows:

1. On May 24, 1956, The Development Company, Inc., for value received, executed a note for \$20,000.00 secured by a mortgage on real estate in Sebastian County, Arkansas. The mortgage was duly filed and recorded on June 7, 1956; and, before maturity, the said indebtedness, together with the mortgage, was transferred to the appellee, Pioneer American Insurance Company of Dallas, Texas (hereinafter called "Pioneer"). The note bound the maker, "... in the event of default herein and of the placing of this note in the hands of an attorney for collection, or this note is collected through any court proceedings, to pay a reasonable attorney's fee." The mortgage securing the note provided that if the grantor should fail to pay any  
256 interest or installment of principal when due, then, at the option of the holder, all of the indebtedness secured by the said mortgage should become due for all purposes and there could be foreclosure in a court of competent jurisdiction.

2. By deed recorded March 18, 1958, The Development Company, Inc. sold the mortgaged real estate to Ocie A. Rogers and Florene W. Rogers, his wife, who assumed the mortgage and indebtedness held by Pioneer.

3. The Rogers failed to make the monthly payment in October, 1960, and all subsequent payments; and on March 24, 1961, Pioneer filed foreclosure for the balance due on the debt and interest, and also for a reasonable attorney's fee. The United States of America was made a defendant in the foreclosure suit because of the federal tax liens that had been filed against Ocie A. Rogers and Florene W. Rogers, the said liens having been filed on the dates and in amounts as follows:

November 29, 1960	\$1776.65
January 30, 1961	1567.14
April 14, 1961	1288.96
July 17, 1961	1606.87
October 3, 1961	1148.69

4. The United States Government, by answer admitted its lien to be subordinate to the mortgage and interest, but claimed its tax lien to be superior to the attorney fee. 257. On November 11, 1961, the Chancery Court entered a decree of foreclosure which determined priority as between Pioneer and the United States Government, as follows:

"The lien of United States of America is therefore found to be subordinate to the lien of plaintiff, Pioneer American Insurance Company, for all amounts it secures, including principal of the note and interest thereon; . . . and attorney's fees fixed by the court; . . ."

The decree in the Chancery Court also contains these statements which are submitted by appellant on this appeal:

"The United States of America has in open court conceded that its lien is subordinate to the lien of plaintiff, Pioneer American Insurance Company, insofar as principal and interest of said plaintiff's note are concerned. . . . The United States of America claims, however, that its lien is prior to the lien of plaintiff, Pioneer American Insurance Company, so far as same secures . . . attorney's fee; . . ."

So much for dates and background information. The United States Government (hereinafter sometimes called "Appellant") has appealed from so much of the Chancery decree as adjudged the attorney's fee allowed Pioneer in the sum of \$1250.00 to be superior to the United States' tax lien claims;<sup>1</sup> and the appellant relies on U. S. Code Annotated, Title 26, § 6321 *et seq.*; and also, *inter alia*,<sup>2</sup> the following cases: *U. S. v. New Britain*, 347 U.S. 81, 98 L. Ed. 520, 74 S. Ct. 367; *U. S. v. Security Trust & Savings Bank*, 340 U.S. 47, 95 L. Ed. 53, 71 S. Ct. 111; *U. S. v. Bond* (4th Cir.), 279 F. 2d 837 (certiorari denied by U. S. Supreme Court, 364 U.S. 895, 5 L. Ed. 2d 189, 81 S. Ct. 220); *U. S. v. Christensen* (9th Cir.), 269 F. 2d 624; and *In Re New Haven Clock & Watch Co.*, (2d Cir.), 253 F. 2d 577.

We recognize the power of the United States Government to legislate as to the rights to be accorded its tax liens; and we recognize the power of the United States Supreme Court to be the final arbiter in such cases as this. Nevertheless, we do not consider any of the cases relied on by the appellant as completely decisive of the case at bar because of the matters that we now mention:

(A) Section 68-102 Ark. Stats., which is a part of the Negotiable Instruments Law,<sup>3</sup> states: "The sum payable is a sum certain . . . although it is to be paid: . . . (5) With costs of collection or an attorney's fee in case payment shall not be made at maturity."

<sup>1</sup> There were other parties in the foreclosure suit and other lien claims involved; but there is no occasion to give details as to these matters because the only issue on this appeal by the United States Government is as stated in its brief: "Federal tax liens take priority over a mortgagee's lien for an attorney's fee incurred in a foreclosure proceeding, where the federal liens were recorded prior to the time lien for an attorney's fee became choate."

<sup>2</sup> Both sides have favored us with briefs containing scores of cases, all of which have been studied by us; but we list here those which are most strongly relied on by the appellant, and which have factual situations most similar to the case at bar.

<sup>3</sup> By Act No. 185 of 1961 Arkansas adopted the Uniform Commercial Code, effective January 1, 1962; and § 85-3-106 Ark. Stats. contains the provision of the Uniform Commercial Code similar to § 61-102 Ark. Stats. above quoted.

(B) The Arkansas Statute on attorneys' fees is Act No. 350 of 1951 (now found in § 68-910 Ark. Stats.), and reads: "A provision in a promissory note for the payment of reasonable attorneys' fees, not to exceed ten per cent (10%) of the amount of principal due, plus accrued interest, for services actually rendered in accordance with its terms is enforceable as a *contract of indemnity*." (Emphasis supplied.)

(C) The United States Government conceded, in open court below, and conceded in its brief filed in this Court, that its tax lien is subordinate to the mortgage and interest in full to date of payment. In accordance with the foreclosure decree, the mortgaged property was sold, and with the consent of the United States Government, Pioneer received the balance of its principal and all interest due to the date of such payment; and a further sum is now held in the Court to await the result of this litigation.

(D) The default in the payment of the note and mortgage held by Pioneer occurred in *October 1960*; and it was not until *November 1960* that the first tax lien of the United States Government was filed in this case.

We regard Paragraphs (A) to (D) above as, together, being sufficient to distinguish the case at bar from those relied on by the United States Government, as heretofore listed. In the *New Britain* case,<sup>4</sup> the United States Supreme Court spoke of the requirement that the lien must be "choate."<sup>5</sup> The recording of the mortgage in 1956 put the world on notice that if there should be a default in payment of the note an attorney's fee would be added. There was such a default in October 1960 and the holder of the note, immediately upon such default, became entitled to enforce the contract of indemnity; and

<sup>4</sup> *U.S. v. New Britain*, 347 U.S. 81, 98 L. Ed. 529, 74 S. Ct. 367.

<sup>5</sup> Attorneys for Pioneer have quoted to us the language of the U. S. Supreme Court in the case of *Security Mfg. Co. v. Powers*, 278 U.S. 149, 49 S. Ct. 84, 73 L. Ed. 236, as regards when a lien becomes choate: "The lien was not inchoate at the time of the adjudication. It had already become perfect when the principal note and the loan deed securing it were given. . . . When by the happening of the event the contingent liability becomes absolute, the lien becomes enforceable, though this occurs after the adjudication."

all of this was prior to any lien filed by the United States Government. So we are definitely of the opinion that the right for attorney's fee became choate before the United States Government filed its lien claim.

We have carefully studied the case of *U. S. v. Bond*,<sup>6</sup> and also the Virginia statutes and cases<sup>7</sup> regarding attorneys' fees in foreclosure of mortgages since the case arose in Virginia; and we fail to find any statute in Virginia that is comparable to our Act. No. 350 of 1951 which says that the contract to pay attorneys' fee is a *contract of indemnity*. Such a statute in this State makes a difference between the Bond case and the case at bar.

262 In the case at bar the United States has conceded all the time that Pioneer is entitled to its *full debt and interest to date of payment*. Unless Pioneer gets its attorney's fee, it will not receive its full debt and interest, because the attorney's fee will have to be paid by Pioneer out of its debt and interest. So when the United States Government concedes—as it must under the adjudicated cases—that the prior mortgage is entitled to payment in full, it cannot expect the mortgagee to leave its attorney unpaid in the face of a statute which says that the attorney's fee is a contract of indemnity. In 27 Am. Jur. 471, "Indemnity" § 22, in discussing a contract of indemnity against liability, the text quotes the holdings: "In all actions on bonds of indemnity it must appear that the condition of the bond was broken, but, such fact appearing, the obligee is not obliged to wait until he is compelled to discharge the debt; he may bring an action for a full recovery the moment the first breach happens in failing to perform the condition of the bond." (Emphasis supplied.)

There is another point that favors Pioneer's claim for attorney fees and which was not discussed in any of the cases cited and relied on by the United States Government in the case at bar; and that is the matter of unjust enrichment. We find no holding directly in point, but we do find the general rules discussed in

<sup>6</sup> *U. S. v. Bond* (4th Cir.), 279 F. 2d 837.

<sup>7</sup> Among others, there are: *Colley v. Summers*, 119 Va. 439, 89 S.E. 906, and *Cox v. Hagan*, 125 Va. 656, 100 S.E. 666.

American Law Institute's Restatement of the Law, "Restitution" § 103 *et seq.* on the topic on "Protection of Property". Pioneer employed attorneys, foreclosed the mortgage, caused a sale of the property and its conversion into money. The United States Government seeks to receive the money before the payment of the fee due the attorneys, whose efforts brought the money into Court. To allow such would violate the rules against unjust enrichment. While attorneys love their work, they do not work entirely for love. Someone must pay the fee; Pioneer employed attorneys after a default which had occurred before the United States ever filed a tax lien; and Pioneer proceeded to reduce the mortgaged property to cash. Under such facts the United States Government should not be allowed to assert a claim superior to the payment of the fee that Pioneer has paid to cause the mortgaged property to be reduced to cash and the proceeds readied for distribution, as they now are.

We are firmly of the opinion that in a court of equity Pioneer was entitled to prevail for its attorney's fee; and we therefore affirm the decree of the Sebastian Chancery Court.

HARRIS, C. J. dissent.

ED. F. McFADDIN

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IN THE SUPREME COURT OF ARKANSAS

OCTOBER TERM 1961

UNITED STATES OF AMERICA, *Appellant*,

v.

PIONEER AMERICA INSURANCE COMPANY, *Appellee*.

Appeal from Sebastian Chancery Court,  
Ft. Smith District

**Judgment—June 4, 1962**

This cause came on to be heard upon the transcript of the record of the chancery court of Sebastian County, Ft. Smith District, and was argued by solicitors; on consideration whereof it is the opinion of the Court that there is



no error in the proceedings and decree of said chancery court in this cause.

It is, therefore, ordered and decreed by the Court that the decree of said chancery court in this cause rendered be, and the same is hereby, in all things affirmed with costs, and that said appellee recover of said appellant and National Surety Corporation, surety in the supersedeas bond filed in this cause, the sum of Twelve Hundred Fifty Dollars, with interest at six per cent per annum from the 15th day of November, A.D. 1961, the amount of decree in said chancery court.

It is further ordered and decreed that said appellee recover of said appellant and said surety all its costs in this Court and the court below in this cause expended, and have execution thereof.

HARRIS, C. J., dissents.

June 4, 1962

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267 (Clerk's Certificate to foregoing transcript  
omitted in printing)

268 SUPREME COURT OF THE UNITED STATES  
No. 405 October Term, 1962  
UNITED STATES, *Petitioner*,

v.

PIONEER AMERICAN INSURANCE COMPANY, ET AL.

**Order Allowing Certiorari—November 19, 1962**

The petition herein for a writ of certiorari to the Supreme Court of the State of Arkansas is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.